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No._____

IN THE SUPREME COURT OF THE UNITED STATES

C.A. TERHUNE, et al., *Petitioners*

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether public agency employees relying on written policy they are required to follow are entitled to qualified immunity as a matter of law despite a court's later determination the policy is unlawful, a question as to which Circuit courts differ in principle.

2. Whether *Turner v. Safley*, 482 U.S. 78 (1987), requires prison officials to change or replace record-keeping practices and computer information systems to accommodate dual use of prisoners' commitment and legal religious names regardless of the impact on prison resources and administration, a question presenting a direct intercircuit conflict.

[Petitioners do not base their petition for writ of certiorari on the following question, but respectfully reserve the right to argue this question and subsidiary issues fairly included should this petition be granted.]

3. Whether the Ninth Circuit's misapplication of *Turner* affects the precedential value of its opinions on inmates' legal religious name changes and calls into question their continuing validity.

LIST OF PARTIES

Petitioners are C.A. Terhune, Director, California Department of Corrections (CDC),[1] John Ratelle, former Warden, California State Prison-Los Angeles County (CSP-LAC), Mike Yarborough, CSP-LAC Chief Deputy Warden, G. Bonnie Garibay, former Chief, Inmate Appeals, CDC, D. Felix, former CSP-LAC Correctional Counselor II, D. Lorenzen, former CSP-LAC Correctional Counselor I, and D. Whyte, former CSP-LAC Correctional Counselor I.[2] Garibay, Felix, Lorenzen and Whyte are currently employed by CDC in other positions.

The respondent is Shomari Naeem Shuaibe, also known as Felton Lee Guillory. He is incarcerated at CSP-LAC.

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1. Director C.A. Terhune is substituted for former Director, James Gomez, sued in his official capacity only. Rule 35.3.

2. Named defendant Victor Bluestein, former CDC Hearing Examiner, is deceased. A suggestion of death on the record was filed on December 10, 1996 and no motion for substitution was timely filed. As of the date this petition for writ of certiorari was filed, he had not been dismissed as a defendant in this action.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

C.A. TERHUNE et al., *Petitioners*,

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY,
Respondent.

Petitioners respectfully petition for a writ of certiorari to review the orders of the United States Court of Appeals for the Ninth Circuit in this case denying petitioners' interlocutory appeal from the order denying them qualified immunity and denying their petition for rehearing and suggestion for rehearing *en banc*.

OPINION BELOW

The opinions of the court of appeals are set forth at Appendix 1a-2a.

STATEMENT OF JURISDICTION

Petitioners-defendants filed an interlocutory appeal to the Ninth Circuit Court of Appeals following the denial of their motion for summary judgment on, *inter alia*, the grounds of qualified immunity. On October 19, 1999, the Ninth Circuit Court of Appeals affirmed the district court's denial of defendants' motion for summary judgment on the basis that defendants were not entitled to qualified immunity. The Ninth Circuit denied petitioners' petition for rehearing and suggestion for rehearing *en banc* on January 25, 2000. On April 6, 2000, this Court

extended the time for filing this petition for writ of certiorari to and including May 24, 2000.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AMENDMENTS INVOLVED

This appeal concerns the Free Exercise Clause of the First Amendment of the United States Constitution, which provides, in pertinent part:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof..."

The Fourteenth Amendment of the United States Constitution makes the First Amendment applicable to the states. The Fourteenth Amendment provides, in pertinent part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

STATUTES INVOLVED

Section 1983 of Title 42 of the United States Code provides, in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Respondent (plaintiff) Shomari Naeem Shuaibe, also known as Felton Lee Guillory, is a prisoner incarcerated at California State Prison-Los Angeles County (CSP-LAC) in California. In 1995, he

brought this suit for damages and declaratory and injunctive relief under 42 U.S.C. § 1983 alleging that his First Amendment and state law guarantees freedom and free exercise of religion were violated because he had been refused canteen, visits, Receiving and Release (R&R) services and medical attention under his new, legal religious name (Shuaibe). He alleged his inmate appeal had been denied. In his administrative appeal, he had requested that he be allowed visits, medical attention, R & R services, canteen, identification cards and correspondence with the prison administration in his legal religious name and that his legal religious name be put on his central file and in the prison computer.

Shuaibe sued the Director of the California Department of Corrections (CDC)[3] and each of the seven CDC employees who relied on written departmental administrative policy contained in §73010.6.1 of the Departmental Operations Manual (DOM)[4] in denying his inmate appeal. Shuaibe also claimed that the former director violated the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4.

Defendants filed an answer on June 21, 1995, asserting, *inter alia*, the affirmative defense of qualified immunity. Defendants did not contest the sincerity of plaintiff's beliefs or his desire to use his religious name.

Defendants filed a motion for summary judgment on December 10, 1996. As the RFRA was still in effect, defendants argued plaintiff had failed to make an adequate showing that his exercise of religion was substantially burdened because he failed to show defendants had interfered with a tenet or belief central to his religion or prevented him from having an experience that his faith mandated. Defendants submitted evidence that the plaintiff told his correctional counselor he wanted to replace his commitment name with his religious one, that the institutional Muslim chaplain had not informed CSP-LAC Chief Deputy Warden Yarborough adopting a new religious name was mandated by the tenets

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3. James Gomez was CDC Director at the time plaintiff filed his complaint. Mr. Gomez's successor is C.A. Terhune.

4. *See*, Appendix, 53a-54a, for text of this section at the time of plaintiff's legal name change and its 1992 and 1995 amendments.

of that faith, that the Departmental computer systems were not designed to accept more than one commitment name, that updating computer systems would be costly, that the Department was engaged in a long-term project to computerize much of the information in inmate central files and that there were safety and security concerns regarding inmate name changes. Each of the six living defendants involved in reviewing plaintiff's inmate grievance submitted declarations[5] stating that they relied on DOM § 73101.6.1, which sets forth the Department's administrative policy, in denying plaintiff's administrative appeal.

Defendants argued they were entitled to qualified immunity because 1) earlier precedent was ambiguous and the contours of an inmate's right to use a legal, religious name in addition to his commitment name had not been clearly established, 2) prison officials do not have to change their records to reflect new legal religious names of prisoners, 3) reasonable non-policy-making employees would have believed that following written departmental policy did not violate an inmate's clearly established rights, and 4) qualified immunity extends to prison officials who rely on facially valid regulations and protects those who relied on published regulations even if a court later determines their reliance to be in error.

Plaintiff also filed a motion for summary judgment. Each party filed an opposition to the other's motion and statements of genuine issues in support of their oppositions. The parties noted a disagreement as to whether plaintiff told defendant Whyte he wanted to substitute his religious name for his commitment name or to use both names. All living defendants except former Director Gomez filed declarations stating they relied on DOM §73010.6.1 in denying plaintiff's inmate appeal. Their reliance on written departmental policy is not disputed. Plaintiff alleges no other act by these defendants which he claims to violate his federally guaranteed rights.

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5. Due to her absence from the office, there was a delay in the filing of the signed original declaration from Ms. Garibay, Chief, Inmate Appeals. The record is unclear whether it was considered by the district court judge during her *de novo* review of the Report and Recommendation.

On June 25, 1997, this Court ruled the RFRA was unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2365, 138 L. Ed. 2d 624 (1997).

On July 24, 1997, the Magistrate Judge issued a partial report and recommendation on the parties' cross-motions for summary judgment which, *inter alia*, denied defendants' motion for qualified immunity. Appendix, 17a-53a. Relying on *Malik v. Brown*, 16 F. 3d 330 (9th Cir. 1994) (*Malik I)* (9th Cir. 1994), *mandate recalled and opinion supplemented*, 65 F.3d 148 (9th Cir. 1995) *(Malik II*), and *Malik v. Brown*, 71 F. 3d 724 (9th Cir. 1995) (*Malik III*), the Magistrate Judge found that the law had been clearly established. Appendix, 39a. The court denied defendants qualified immunity on the grounds that there was a genuine issue of material fact which precluded the entry of judgment in favor of defendants. Appendix, 36a-37a. The Report and Recommendation did not address the argument that CDC employees were entitled to qualified immunity because they relied on written departmental policy which a reasonable correctional employee would have believed was constitutional.

The Magistrate Judge reviewed the record developed when the RFRA provided the applicable standard of review. Applying *Turner*, he concluded that defendants had not offered evidence of any legitimate penological reasons why plaintiff should not be allowed to use his religious name as well as his commitment name. Appendix, 40a. He found that it was without substantial controversy that defendants had violated, and were continuing to violate, plaintiff's constitutional rights. He deferred a decision on plaintiff's request for prospective injunctive relief for a later motion. Appendix, 44a-45a.

In their objections to the Report and Recommendation, defendants asked that the motion cut-off date be reopened in light of the recent change in the applicable standard of review or, in the alternative, for a de novo review. Defendants filed supporting declarations discussing, *inter alia*, the inability of the Department to add plaintiff's religious name to virtually all of its existing computer networks, information systems, and programs; competing demands for departmental information systems resources; interference with mission critical directives; and the length and expense of reprogramming or replacing Departmental systems. A declaration noted that many local institutions

and departmental contractors utilized stand alone personal computers and non-departmental information systems. It could not be readily ascertained whether religious names could be added to these stand alone personal computers and private third party information systems. Appendix, 8a-16a[6].

On September 4, 1998, the district court issued an order adopting and approving the partial Report and Recommendation. On September 17, 1998, defendants filed a motion for reconsideration. It was denied on October 16, 1998. On October 28, 1998, plaintiff filed a substitution of attorneys. Defendants filed a notice of appeal on November 16, 1998.

Defendants filed their opening brief on March 5, 1999. The Ninth Circuit applied the *de novo* standard of review to defendants' interlocutory appeal. The Ninth Circuit denied their interlocutory appeal in an unpublished memorandum decision which did not discuss petitioners' contention they were entitled to qualified immunity because they relied on written policy, a fact which was not in dispute, in denying Shuaibe's inmate appeals. Appendix, 3a-4a. Citing *Collins v. Jordan*, 110 F.3d 1363 (9th Cir. 1997), the Ninth Circuit found that defendants were not entitled to qualified immunity as a matter of law because there was a disputed factual issue. The Ninth Circuit did not discuss the Sixth and Eighth Circuit authority defendants cited in support of their qualified immunity claim even though following this precedent would render the dispute as to whether Shuaibe wanted only his religious name or his religious and commitment names on his records and in the prison computer immaterial. The Ninth Circuit did not discuss *Malik v. Brown*, 16 F. 3d 330 (9th Cir. 1994) (*Malik I*) or *Malik v. Brown*, 71 F. 3d 724 (9th Cir. 1995) (*Malik III*), cited and relied upon as mandatory precedent by the district court in its denial of qualified immunity. *Malik* was extensively briefed and discussed in the district court record.

Defendants filed a petition for rehearing and a suggestion for rehearing *en banc* suggesting the Ninth Circuit overrule *Malik v. Brown*, 16 F. 3d 330 (9th Cir. 1994) (holding that an inmate is permitted to use both his legal religious and commitment names in all his daily affairs).

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6. The information in the last tow sentences of paragraph 3 of the August 14, 1997 declaration of Wagner is no longer accurate. Appendix, 10a.

The Ninth Circuit denied defendants' petition in an unpublished memorandum decision. Appendix, 1a-2a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with the timely opportunity to resolve two intercircuit conflicts: 1) whether public agency employees are entitled to qualified immunity as a matter of law in a 42 U.S.C. § 1983 civil rights action when the only act complained of is their reliance on written policy they did not create, cannot change and must follow as a condition of their employment, and 2) whether state prison officials are required to change or modify their record-keeping practices and replace or reprogram all their computer information systems regardless of expense or operational disruption in order to accommodate inmates' new legal religious names.[7] The first question presents a conflict in principle, the second a direct conflict.

The second intercircuit conflict also presents the court with the opportunity to clarify the application of the *Turner v. Safley* reasonableness test. The *Malik* Court appears to have misapplied the *Turner* test, because, unlike the Ninth Circuit panel in *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993) (holding *Turner* applied to inmate's free exercise claims but remanding for factual findings), the *Malik* Court reversed a district court determination based solely on the first *Turner* factor but did not remand the case for fact-finding as to the remaining *Turner* factors. The Fifth and Sixth Circuits expressly note that a trial court is not required to weigh evenly or even consider explicitly each of the four *Turner* factors. *Spies v. Voinovich*, 173 F. 3d 398, 403 (6th Cir. 1999); *Scott v. Mississippi Department of Corrections*, 961 F.2d 77, 80 (5th Cir. 1992). The Ninth Circuit has not expressly followed or approved the views expressed by the Fifth and Sixth Circuits. In practice, however, the majority opinion in *Spies* devoted substantially more attention to the fact-intensive analysis of each *Turner* factor involved in determining whether the inmate was entitled to prevail on his First Amendment Free Expression claim to use his legal religious name than the *Malik* court did.

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7. Defendants do not contest the sincerity of Shuaibe's religious beliefs or his desire to use his religious name; they only contest the burden accommodation of that request entails.

The Ninth Circuit's unsupported conclusion in *Malik* that it would not be burdensome to permit an inmate to use his religious name in his daily affairs effectively requires a prison system to enter the religious name in its various computer information systems if possible, or to reprogram or replace them if not. Since prisons routinely share arrest and conviction history with other law enforcement agencies including the Federal Bureau of Investigation and the Federal Bureau of Prisons, and, where appropriate, the United States Immigration and Naturalization Service, and since they both send and receive holds, warrants and detainers, changes in one state's information and data reporting systems can have a ripple effect throughout law enforcement and criminal justice agencies across the nation. Thus, the Ninth Circuit's conclusory examination of the *Turner* factors in *Malik* may have grave unintended consequences for the Federal Bureau of Prisons, the Federal Bureau of Investigation, sister states, local correctional agencies, and cooperative and local law enforcement agencies not parties to *Malik*. These agencies are either directly subject to the holding in *Malik* or maintain or use criminal history and other information systems and networks potentially affected by it.

California's inability to accommodate dual use of commitment and legal religious names without prohibitive costs and significant disruption of on-going operations is religiously neutral. CDC does not permit the dual use of commitment and legal names of inmates who obtain new legal names while incarcerated through marriage, divorce, or other non-religious reasons. The same technological barriers, financial considerations and security concerns attach to non-religious legal name changes as do to religious legal name changes.

In *Shuaibe*, the district court did not conduct its own *Turner* balancing test on a record prepared in anticipation of the *Turner* standard of review. Further, it relied on *Malik v. Brown*, 16 F. 3d 330 (9th Cir. 1994) to find that the law was clearly established even though the relief Shuaibe seeks is far more extensive than that sought by the plaintiff in *Malik*. The issue of permanent injunctive relief has yet to be litigated in *Shuaibe*. Therefore, it is appropriate for this Court to exercise its supervisory powers to clarify the application of the *Turner* reasonableness test in the circumstances presented in this case.

1.

THERE IS A CONFLICT AMONG THE CIRCUITS ON THE QUESTION WHETHER PUBLIC EMPLOYEE DEFENDANTS RELYING ON WRITTEN POLICY A COURT LATER FINDS TO BE IN ERROR ARE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW

This petition should be granted to resolve the conflict among the circuits regarding the question whether public employees required as a condition of their employment to follow written policy which they did not make, may not modify and cannot ignore are entitled to qualified immunity as a matter of law even if a court later finds their employer's policy to be in error. Here, plaintiff alleged he had been refused canteen, visits, R & R and medical attention under his new religious name. He exhausted his administrative remedies under the inmate grievance system prior to bringing suit. He named as defendants the CDC director and the seven CDC employees who denied his grievance. The six living employee defendants have asserted the defense of qualified immunity. In this case, no party disputes that the CDC employees relied on written departmental policy in denying plaintiff's inmate grievance. No other federally cognizable unconstitutional acts are alleged against the employee defendants.

At the time plaintiff's lawsuit was filed, there was no Ninth Circuit authority explicitly holding the acts complained of violated clearly established law. In a 1995 decision published five months after defendants had filed their answer, a divided panel of the Ninth Circuit held that the right of an inmate to use both his commitment and religious names on outgoing mail was clearly established in 1990. *Malik III*, 71 F. 3d at 726, 730.[8] None of the cases cited by the Ninth Circuit in *Malik I* or *Malik III* hold or suggest that it was clearly established that an inmate's dual use of religious and commitment names must be

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8. The California Department of Corrections' Departmental Operations Manual (DOM) was amended in 1995 to provide for dual use of legal religious and commitment names in conjunction with mail and visiting records. The amendment did not require a change of primary identifier on tangible records or in computer systems. Appendix, 53a-54a.

accommodated in both tangible, written records and computer information systems. Nor do they hold or suggest that it was clearly established that dual use of religious and commitment names must be accommodated in tangible, written records when to do so would confuse, disrupt, or interfere with the efficient operation of correctional and law enforcement computer information systems.

Despite this, the *Shuaibe* district court denied defendants qualified immunity. The Ninth Circuit denied their interlocutory appeal and petition for rehearing. In so doing, both courts rejected defendants' argument they were entitled to qualified immunity because they relied on written departmental policy.

The Sixth Circuit holds that prison officials relying on published regulations are entitled to qualified immunity even though courts reviewing the officials' action may subsequently find that their interpretation of the regulation was in error. *Wolfel v. Morris*, 972 F. 2d 712, 719-20 (6th Cir. 1992). The Eighth Circuit reaches the same result with its holding that the doctrine of qualified immunity protects officials from liability for their reasonable efforts even if their conclusions and actions are arguably wrong. *Moorman v. Thalacker*, 83 F. 3d 970, 974 (8th Cir. 1996) (recognizing, at 83 F. 3d at 975, that prison officials' interpretation and application of their disciplinary regulations is a "classic situation for which qualified immunity is designed"); *Bartlett v. Fisher*, 972 F. 2d 911, 914 (8th Cir. 1992); *Gorra v. Hanson*, 880 F. 2d 95, 97-98 (8th Cir. 1989). It is reasonable for public employees to apply the written policies and procedures of their employers without changes, modifications and exceptions.

In its unpublished memorandum decision in *Shuaibe*, the Ninth Circuit declined, without explanation or comment, petitioners' suggestion it follow this precedent in deciding their interlocutory appeal on the denial of qualified immunity. Instead, the Ninth Circuit wrongly concluded that a factual question precluded the granting of qualified immunity to the state employee defendants. Appendix, 3a - 4a. The Ninth Circuit had jurisdiction to consider petitioners' assertion, implicit in their appeal and explicit in their petition for rehearing, that the dispute over what relief plaintiff sought in his inmate appeal was not material to petitioners' claim their reliance on written policy entitled them to

qualified immunity. Cf., *Behrens v. Pelletier*, 516 U. S. 299, 116 S. Ct. 834, 842, 133 L. Ed. 2d 773 (1996).

The Ninth Circuit's recent opinion in *LSO, Ltd. v. Stroh*, 205 F. 3d 1146 (9th Cir. 2000) demonstrates that the circuit conflict is entrenched. In *LSO*, the Ninth Circuit rejected the argument of California Alcoholic Beverage Control Board officials that they were entitled to qualified immunity because, *inter alia*, Article III, Section 3.5, Subdivision (a) of the California Constitution provides that an administrative agency has no power to "refuse to enforce a statute, on the basis of its being unconstitutional, unless an appellate court has made a determination that such statute is unconstitutional." Petitioners have not relied on the California Constitution to support their claim of qualified immunity. However, this provision illustrates the strong public policy interests state and local public agencies have in ensuring their employees apply policy uniformly rather than making unilateral decisions which could lead to litigation alleging policies were being applied arbitrarily, capriciously, or in a discriminatory manner. These interests are particularly compelling in the prison setting.

There is no federal constitutional right to an inmate grievance system. If the mere act of relying on written departmental policy to deny an inmate's administrative grievance subjects a correctional employee to personal liability, correctional agencies will be hard-pressed to find staff willing to review inmate appeals. Further, to avoid the risk of punitive damages for following written departmental policy, employees would be motivated to make independent and potentially conflicting determinations, leading to haphazard application of policy, inefficient penological administration, increased tensions resulting from perceived favoritism or special treatment of individual inmates, and a breakdown of institutional order.

As this court recognized in *Mitchell v. Forsyth*, 472 U.S. 511, 522, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985), public employees should be able to act without undue fear in the performance of their duties. Requiring employees as well as policy-makers to defend litigation challenging application of agency policies diverts the attention and resources of government and its employees from their normal duties.

The conflict in the circuits is irreconcilable. This petition should be granted because it presents a timely and expedient vehicle for the Court to settle the question conclusively.

2.

THERE IS A PRONOUNCED CONFLICT AMONG THE CIRCUITS WHETHER PRISONS MUST CHANGE OR REORGANIZE THEIR RECORD KEEPING PRACTICES TO ACCOMMODATE INMATES' LEGAL RELIGIOUS NAME CHANGES

This petition should be granted to resolve the conflict among the Circuits regarding whether a prison system must reorganize its records or change its record-keeping practices to accommodate inmates' legal religious name changes. The Ninth Circuit holds that an inmate must be permitted to use his legal religious name in all his correspondence, on documents, and in all his daily affairs. *Malik*, 16 F. 3d at 332, 334. The Sixth Circuit holds that an inmate has no constitutional right to dictate how prison officials keep their records. *Spies v. Voinovich*, 173 F. 3d 398 (6th Cir. 1999); *Akbar v. Cannery*, 634 F. 2d 339, 340 (6th Cir. 1980) (per curiam), cert. denied, 480 U.S. 1002, 101 S. Ct. 1712, 68 L. Ed. 205 (1981). Even before *Turner*, the Fourth Circuit reversed a district court order requiring Virginia to reorganize its files according to an inmate's legally adopted religious name. *Barrett v. Virginia*, 689 F. 2d 498, 503 (4th Cir. 1982). In *Bartlett*, the Fourth Circuit recognized the First Amendment does not command affirmative acts on the part of the government and recognized that how prison officials chose to organize their records is quintessentially an administrative matter in which the courts should not intervene.

None of these cases address computer information systems or the need for written records to be compatible with the unique identifiers utilized by correctional administrators to track the inmates' location, trust account information, canteen funds, and other incidents of daily prison life. The opinions do not define the term "record" but it is clear from the context the courts were contemplating file folders which could be relabeled, index cards which could be interlineated, and the like. None of these opinions discuss the inability of a correctional department to cross-reference its written or computer records by identifier (e.g., prison

number, commitment name, combination of prison number and a limited number of letters of the commitment name, legal religious name, etc.) without significantly changing or replacing its practices and equipment. None of the opinions discuss inherent limitations of computer hardware or software.

Cases from the days of typewriter correction tape and carbon paper or hole-punched No. 2 pencil-filled data entry cards do not clearly establish whether changes can be made to late 20th century and early 21st century prison records-keeping and information systems at *de minimis* cost and penological impact. Ironically, it may be more expensive and time-consuming for prison systems to convert to dual use of legal religious and commitment names than it was in the days of correction tape, carbon paper and No. 2 pencils. Prison computer systems, like California's, may not have been designed to permit additional data in each of their various applications' name fields, or may be organized by an unique numeric or alphanumeric identifier for each inmate, rather than by an inmate's name. Limited number of characters in a name field may pose a problem. The need for accurate, speedy and efficient law enforcement data sharing and tracking is another consideration. Staff will need to be trained when existing systems and procedures are changed or replaced. Thus, a subsidiary question fairly included in this intercircuit conflict is whether, in 1994, it was clearly established that a prisoner should be permitted to use both his commitment and legal religious names in his daily affairs when to do so would require extensive revamping or replacement of computer hardware and software for multiple penological and law enforcement applications throughout a correctional system and potentially throughout those agencies with which it is required to share information.

The California Department of Corrections' Information Systems Branch supports a host of mainframes, mini-computers, micro-computers and personal computers. Some of its thirty-three institutions also utilize personal computers not supported by or registered with headquarters. Most of CDC's current computers and information systems do not permit entry of new inmate religious or other non-commitment names. Many systems and networks would have to be replaced entirely as they cannot be reprogrammed to accept additional names. Private contractors contract with CDC to provide work release and parole re-

entry programs. Their ability to incorporate religious names in their computers and information systems is unknown. Appendix, 11a.

Here, the *Shuaibe* district court relied on *Malik* in holding that petitioners are violating respondent's First Amendment rights. The district court reserved the issue of prospective relief for a subsequent motion. Thus, this interlocutory petition should be granted because it presents a timely and expedient vehicle for the court to settle conclusively the question of the extent to which correctional systems are required to change prison record-keeping practices and information systems to accommodate inmate religious names.

3.

DEFENDANT PRISON OFFICIALS' SUBSIDIARY QUESTIONS ARE FAIRLY PRESENTED

This Court's Rule 14.1.(a) provides that only the questions set out in the petition or fairly included therein will be considered by this Court. The Ninth Circuit's application of *Turner* in *Malik* is fairly presented in this petition. Defendants were initially denied qualified immunity because of *Malik* and the district court relied on *Malik* to hold that defendants violated and continue to violate Shuaibe's rights.

Moreover, *Malik* does not affect only the parties to this case. It stands as precedent for state and local prison officials within the entire Ninth Circuit, and as persuasive authority for federal inmates' *Bivens* actions. Thus the subsidiary questions set forth in this petition should not be read merely as the complaint by one affected party that a properly stated rule of law (*Turner*) was misapplied in *Malik*, thereby creating unfavorable precedent which was applied against that party in *Shuaibe*. Further, the California Department of Corrections and other prison systems were not parties to *Malik* and had no opportunity to raise their concerns about the effect the proposed accommodation would have on the allocation of their prison resources. Since consideration of the application of *Turner* to *Malik* is essential to this court's analysis of the qualified immunity denial in *Shuaibe*, and resolution of the inmate's motion for permanent injunctive relief, these subsidiary issues are fairly

comprised in the questions presented. Cf., *Procunier v. Navarette*, 434 U.S. 555, 559-560, n.6 98 S.Ct. 855, 55 L.Ed.2d 24 n. 6 (1978).

4.

THE NINTH CIRCUIT'S APPROACH IGNORES *TURNER'S* MANDATE TO CONDUCT AN INFORMED AND INDIVIDUALIZED REASONABLENESS ANALYSIS WHEN REVIEWING REGULATIONS ALLEGED TO IMPINGE ON AN INMATE'S CONSTITUTIONAL RIGHTS

In *Malik v. Brown*, 16 F.3d 330 (9th Cir. 1994) (*Malik I*) (9th Cir. 1994), *mandate recalled and opinion supplemented*, 65 F.3d 148 (9th Cir. 1995) (*Malik II*), the Ninth Circuit failed to conduct an informed analysis of the four *Turner* factors set forth by this Court. Malik filed a lawsuit claiming in part that he had been disciplined for using only his religious name on outgoing correspondence in contravention of Washington state penal regulations. The Ninth Circuit reversed the lower court's holding that Malik, who had converted to Islam while incarcerated, did not have a sincerely held religious belief in the use of his legal religious name. The District Court had considered just part of the first of *Turner*'s four factors: the reasonableness of the prison's regulations. *Malik*, 16 F. 3d at 332 and 334. The Ninth Circuit did not remand the case back to the District Court for further proceedings. Instead, it *sua sponte* applied the four part *Turner* test on an apparently undeveloped record. The court's discussion of the three remaining *Turner* factors consists of one paragraph, four sentences in length, which is devoid of any reference to contentions of the parties or the district court record. *Id.* at 334. The court neglected to apply the appropriate standard of review, necessitating a recall of its mandate to supplement the opinion. *Malik II.*

Further, the regulation in question in *Malik* concerned outgoing inmate mail. The Ninth Circuit significantly expanded the scope of its *Turner* analysis to include use of religious names on correspondence, documents and in the inmate's "daily affairs." *Malik I*, 16 F.3d at 334, 335. *Turner* suggested that a court may consider an alternative that fully accommodates a prisoner's rights at *de minimis* costs to valid penological

interests as evidence that the regulation does not satisfy the reasonable relationship between the challenged regulation and the penological interests for it. There appears to have been no inquiry in *Malik* into whether the dual use of an inmate's religious and commitment names in all his daily affairs, as opposed to outgoing correspondence, can be achieved at *de minimis* cost.

The Ninth Circuit's assumptions about the minimal impact its *sua sponte* expansion of the issues presented by *Malik* would have on "guards and other inmates, and on the allocation of prison resources generally" (*Turner*, 482 U.S. at 90) have led to grave unintended consequences for petitioners and the State of California. The "ripple effect" (*id.*) of requiring dual recognition of commitment and religious names within the Ninth Circuit may unduly burden federal and local law enforcement agencies throughout the nation who rely on California's participation in multi-agency information sharing and tracking systems.

In *O'Lone v. Estate of Shabazz*, 482 U.S. 343, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1997) (holding that prison regulations which prevented Muslim inmates from attending weekly congregational services did not violate their First Amendment rights under the Free Exercise Clause), this Court reaffirmed its refusal to substitute its own judgment in difficult and sensitive matters of institutional administration, even where claims are made under the First Amendment, recognizing that problems of correctional administration are particularly ill-suited to "'resolution by decree.'" *Id.* at 349-350, quoting *Martinez v. Procunier*, 416 U.S. 396, 405, 94 S. Ct. 1800, 40 L. Ed. 2d 224 (1971). The Ninth Circuit strayed from the principles enunciated in *O'Lone* and *Turner* in expanding the scope of the questions presented in *Malik* and in making unsupported assumptions about the effect accommodation of inmates' desire to use legal religious names in conjunction with commitment names will have on prison administration and resources. The Ninth Circuit's misapplication of *Turner* in *Malik* should be reviewed because it undermines the interest of minimizing judicial intrusion in state prison affairs so often articulated by this Court.

This petition presents this Court with an opportunity to provide guidance for lower courts in their application of *Turner* and *O'Lone*. This Court's precedent should be applied in a manner which, while conscious of judicial economy, will ensure that future litigants and triers

of fact and law will be provided the adequate exposition of the record, contentions of the parties and analysis of the court so essential in determining whether a published opinion may be properly followed as binding precedent, relied upon as persuasive authority or rejected as inapplicable to the specific facts, factors and regulations at issue in future litigation.

5.

THE QUESTIONS PRESENTED ARE IMPORTANT

This petition should be granted because the Ninth Circuit's decision in *Shuaibe* undermines the important goals of qualified immunity. Public agency employees should be able to act without undue fear in the performance of their duties. Here, public employees are being required to defend an action for damages even though their only act was their undisputed reliance on written agency policy. Denying them qualified immunity unnecessarily diverts the attention and resources of the government and its officials from their normal duties.

The application of the Ninth Circuit's opinion in *Malik* to respondent Shuaibe's claims undermines the important goals of minimizing judicial intrusion in the affairs of state and local correctional facilities. Concerns about federal court intrusion in prison affairs are heightened in cases involving state penal facilities. The principles of comity as well as this Court's decisions in *Turner*, *O'Lone*, and other prison cases support granting this petition so that this Court can exercise its supervisory powers to correct or limit the Ninth Circuit's misapplication of *Turner* in *Malik*.

The rapid pace of technological innovation has rendered the cases relied upon in *Malik I* and *III* questionable precedent when it comes to determining whether prison officials should be denied qualified immunity because inmate religious names are not recorded in conjunction with commitment names in prison computers and in written documents which are computer-generated or computer-dependent. This Court should exercise its supervisory powers to provide guidance as to the weight and continued validity of this increasingly outdated precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: May 24, 2000.

Respectfully submitted,

BILL LOCKYER
Attorney General
DAVID P. DRULINER
Chief Assistant Attorney General
PAUL D. GIFFORD
Senior Assistant Attorney General
*JANE CATHERINE MALICH
Deputy Attorney General
*Counsel of Record

Counsel for Petitioners

APPENDIX A

FILED
JANUARY 25, 2000
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHOMARI NAEEM SHUAIBE, aka Felton Lee Guillory,	NO. 99-55049
Plaintiff-Appellee,	D.C. No. CV-95-01764-RAP
v.	ORDER
JAMES GOMEZ , former Director, California Department of Corrections (CDC); G. BONNIE GARIBAY, former Chief, Inmate Appeals, CDC; JOHN M. RATELLE, Warden; V. BLUESTEIN, Appeals Examiner; MIKE YARBOROUGH, Chief Deputy Warden (formerly, Associate Warden); D. FELIX, Correctional Counselor II, CSP-LAC; D. LORENZEN, Correctional Counselor I, CSP-LAC; D. WHYTE, Correctional Counselor I, CSP-LAC,	
Defendants-Appellants.	

Before: KOZINSKI and THOMAS, Circuit Judges and RAWLINSON*, District Judge

The full court was advised of the suggestion for rehearing en banc.

No active judge requested a vote on whether to rehear the matter en banc.

* The Honorable Johnnie B. Rawlinson, United States District Judge, District of Nevada, sitting by designation.

The petition for rehearing and motion for leave to file appendix in support of petition for rehearing and suggestion for rehearing en banc are DENIED.

APPENDIX B

FILED
OCTOBER 19, 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHOMARI NAEEM SHUAIBE, aka Felton Lee Guillory,	No. 99-55049
Plaintiff-Appellee,	D.C. No. CV-95-01764-RAP
v.	MEMORANDUM*
JAMES GOMEZ, former Director, California Department of Corrections (CDC); G. BONNIE GARIBAY, former Chief, Inmate Appeals, CDC; JOHN M. RATELLE, Warden; V. BLUESTEIN, Appeals Examiner; MIKE YARBOROUGH, Chief Deputy Warden (formerly, Associate Warden); D. FELIX, Correctional Counselor II, CSP-LAC; D. LORENZEN, Correctional Counselor I, CSP-LAC; D. WHYTE, Correctional Counselor I, CSP-LAC,	
Defendants-Appellants.	

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Submitted August 6, 1999**
Pasadena, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: KOZINSKI and THOMAS, Circuit Judges and RAWLINSON***, District Judge.

There was a disputed issue of material fact in this case, precluding entry of summary judgment on the qualified immunity issue. *See Collins v. Jordan,* 110 F.3d 1363, 1370 (9th Cir. 1997).

AFFIRMED.

*** The Honorable Johnnie B. Rawlinson, United States District Judge, District of Nevada, sitting by designation.

APPENDIX C

FILED
CLERK, U.S. DISTRICT COURT
SEPTEMBER 4, 1998
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY,	Civil No. CV 95-1764-KMW (Mc)
Plaintiff,	ORDER ADOPTING FINDINGS, CONCLUSIONS AND
v.	RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE
JAMES GOMEZ, Director of Corrections, et al.,	
Defendants.	

Pursuant to 28 U.S.C. § 636, the Court has reviewed the parties' motions for summary judgment and papers submitted in support thereof and in opposition thereto, and all other papers filed in this action, including the attached Partial Report and Recommendation of United States Magistrate Judge.

IT IS ORDERED that:

(1) the Partial Report and Recommendation of the Magistrate Judge is approved and adopted;

(2) summary adjudication is granted in favor of the plaintiff

and against the defendants on the ground the following issues are without substantial controversy:

(a) the plaintiff has exhausted administrative remedies;

(b) the plaintiff's use of his religious name is an expression of his religious faith;

(c) the defendants have violated and are violating the plaintiff's right to the free exercise of his religion to the extent they have:

(i) denied the plaintiff the right to be identified by his legal, religious name, and the plaintiff's committed name, in prison computer records and in the plaintiff's central prison file;

(ii) denied the plaintiff the right to use identification and privilege cards which identify the plaintiff by both his committed name and his legal, religious name; and

(iii) denied the plaintiff the right to receive mail services, visitation, medical care, canteen services, otherwise appropriate deliveries of money or other items from non-prisoners, and all other services and benefits to which the plaintiff would be otherwise entitled, in the plaintiff's legal, religious name and his committed name;

(3) the plaintiff's motion for summary judgment is otherwise denied;

(4) summary adjudication is granted in favor of the defendants and against the plaintiff on the ground the following issues are without substantial controversy:

(a) the plaintiff may not sue the defendants for damages in their official capacities;

(b) defendant Gomez is not liable for damages in his individual capacity;

(5) the defendants' motion for summary judgment is otherwise denied.

DATED: 9/2/98

/S/
KIM M. WARDLAW
UNITED STATES DISTRICT JUDGE

APPENDIX D

FILED
CLERK, U.S. DISTRICT COURT
AUGUST 18, 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

DANIEL E. LUNGREN, Attorney General
of the State of California
GEORGE WILLIAMSON, Chief Assistant
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Attorneys for Defendants James Gomez, G. Bonnie Garibay, V. Bluestein[1],
John M. Ratelle, Mike Yarborough, D. Felix, D. Lorenzen, and D. Whyte

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY,	) Case No.: CV 95-1764 (KMW) (Mc)
Plaintiff,	) OPPOSITION TO PARTIAL
v.	) REPORT AND
	) RECOMMENDATION RE:
JAMES GOMEZ, Director of Corrections; G. BONNIE GARIBAY, Chief Appeals; V. BLUESTEIN, Appeals Examiner; JOHN M. RATELLE, Warden; MIKE YARBOROUGH, Associate Warden; D. FELIX, Correctional Counselor II; D. LORENZEN, Correctional Counselor I; D. WHYTE, Correctional Counselor I,	) CROSS-MOTIONS FOR SUMMARY JUDGMENT; REQUEST FOR JUDICIAL NOTICE; DECLARATIONS
Defendants.	

1 Defendants have filed a suggestion of death on the record respecting Mr. Bluestein.

*****

DECLARATION OF WAGNER

I, Larry Wagner, hereby declare and state:

1. I am employed by the California Department of Corrections as the Acting Division Chief for the Information Systems Branch (ISB) of the Evaluation, Compliance and Information Services Division. I have held this position since June 26, 1997. Prior to that I was employed as a Senior Programmer Analyst (Sup.) over several sections of I.S.B. I have been employed by the California Department of Corrections since June 1995. I am making this declaration in my official capacity. I have personal knowledge of the facts contained herein and, if called to testify, could and would testify competently thereto.

2. Among the responsibilities of my position are supervision of departmental staff responsible for planning, developing, implementing and maintaining headquarters-based information systems and statistics systems. Some of our systems are also "rolled out" to institutions state wide. The department uses mainframes, minicomputers, and microcomputers for its headquarters-based information technology projects. At the local, institutional level, some institutions use personal computers to develop and maintain localized information systems which are not supported by the Information Services Branch.

3. In addition to the information systems already in place, the Department has embarked on a multi-year program to make inmate central file information electronically available. Development of that project, the Correctional Management Information System (CMIS), is being supervised by a specially selected task force. The department will contract with outside vendors to develop this. There is on-going litigation regarding this project. The current anticipated start date is August 1, 1998. The expected completion date is 11/30/00.

4. At present, the Department is technologically unable to add plaintiff's religious name to entries of his committed name and CDC number in every applicable Departmental computer information system.

5. There is no one single prison computer and no one single prison computer system. The Department of Corrections is organized into multiple divisions. The Information Systems Branch provides and supports computer systems and programs designed to track inmates' locations and provide other custodial information regarding individual inmates which are utilized by the Institutions Division, Parole and Community Services Division and Health Care Services Division of the Department. The Branch also provides and supports other systems and programs not relevant to the instant complaint. Various institutions may maintain local computers and data collection systems as well. The Department of Corrections contracts with outside

vendors to provide services such as community correctional facilities and parole re-entry programs . Information about these outside vendor's information systems and record-keeping practices is not readily available.

6. The Offender Based Information System (OBIS) was originally implemented in 1977. It is a mainframe system operating at the Stephen P. Teale Data Center. It is used primarily by Case Records staff to record inmate commitments and movements and process the work time credits of inmates who participate in the Inmate Work/Training Incentive Program in order to derive an inmate's sentence. Plaintiff's religious name is listed on the "Also Committed As" (ACA's) alias tracking information in OBIS. A total of five ACA's can be entered for each inmate listed in OBIS. A user must request to see an inmate's ACA information as the Department relies on the commitment name and inmate's CDC number as primary identifiers.

7. The Department's Distributed Data Processing System (DDPS), a conglomeration of other systems, does not currently track aliases. The DDPS is located in all institutions and the central office. Minicomputers are used for the DDPS. Some of the subsystems of DDPS utilize or store inmate names; some do not. The subsystems include automated conteen sales and inventory, visiting information system, inmate job assignments, inmate medical alert, inmate restitution fine collection system, inmate roster

classification system, inmate roster movement system, inmate trust accounting system, and interim transportation scheduling systems. Of those systems which are programmed to accept or track inmate names, none currently accept or track inmates' ACA's.

8. Reprogramming the DDPS system itself would be a major undertaking, if indeed it could be accomplished without endangering institutional and departmental security and disrupting departmental operations. The project could take from two to three years to complete. It is not possible to estimate the cost of reprogramming DDPS at this time because too may variables are unknown. If it is reprogrammed, headquarters and institutional staff would have to be retrained to use the new programs, at additional expense and loss of staff time.

9. Various other, PC based systems are maintained by I.S.B. Fourteen of these systems contain inmates' names among the data stored. Of these, only the Critical Case Management System has the capacity to accept, and does accept, inmate aliases and ACA's. It allows for an infinite number of aliases to be entered. It is uncertain whether technical barriers or roadblocks, such as a limit on the number of characters which can be entered into a given field or limited memory capacity or other technological problems might thwart reprogramming attempts. Assuming it is possible to reprogram them, a very rough estimate of the time that it would take to

reprogram these thirteen other smaller systems to accept religious name ACA's would be approximately six weeks per system. This effort would require two to three staff members at a cost of approximately $20,000 to $25,000 per system.

10. Most of the thirteen other systems containing inmate names are used by the Institutions Division of the Department and its thirty-two prisons. The newest system, the Population Psychiatric Rolodex, is not on line yet. When it does go on line, it will be utilized by only approximately seven or eight institutions because the other institutions have built their own. local systems to track this information.

11. There is no centralized inventory of computers or computer systems programmed and utilized by individual Departmental institutions or Departmental contractors. Since the number of computers and programs is unknown, it is difficult to estimate how much time would have to be devoted to reprogram local computers to accept religious name ACA's if they do not already do so.

12. The Parole and Community Services Division (P&CSD) of the Department of Corrections operates several computer systems independently of other systems. The largest of these, the Interim Parolee Tracking System, stores a parolees' aliases and monikers in a separate table which is separately accessed. It allows for an infinite number of aliases an monikers

to be entered. Another system maintained by P&CSD contains information compiled from the 64 Interim Parolee Tracking System databases. Parolees' aliases and monikers can be found in that system. They can also be found in the Parolee-At-Large system. The other three systems presently maintained by the P&CSD do not contain aliases and would have to be reprogrammed, if reprogramming is possible, to accept them.

13. The Department relies upon an inmate's commitment name and his California Department of Corrections (CDC) number for identification purposes. All of the Department's programming and systems have been developed with the understanding that an inmate's commitment name will be linked to his CDC number and vice versa. The overwhelming majority of the systems which do accept ACA's and AKA's rely on the inmates's commitment name and his CDC number as the way to access information about that particular inmate.

14. The Departments's limited ability to enter and store AKA's and ACA's is religiously neutral. An inmate who marries and adopts his or her spouse's name is still designated by the commitment name in the computer, with the married name as an AKA. Inmates who have legally changed their names for other non-religious and non-family reasons are afforded the same treatment as all other inmates who have legal name changes. AKA's or

ACA's are noted when the system can accept the additional data. They are not noted when the system cannot accept the additional data.

15. The Department would be adversely affected by shifting its scarce information systems resources from basic operations to rebuilding a myriad of systems to accept additional name changes.

16. For example, the timely conversation of Departmental data bases to solve the "year 2000 problem" could be sacrificed. The "year 2000 problem" refers to computer programs which utilize, require or recognize just the last two digits of a year rather than the entire year - - for example, 8/18/97 or '97 rather than 8/18/1997 or 1997. These programs have no way of distinguishing the date 2001 from the date 1901. The Department's inability to devote its full complement of scarce resources to arriving at a timely solution to the "year 2000 problem" would lead to numerous errors in calculating time periods for inmate hearing or parole dates. Such errors would be both unacceptable and unavoidable.

17. In my view, it would cause immeasurable harm to the Department and to inmates and parolees were Departmental resources diverted from tackling exigent issues like the "year 2000 program" and from routine operations so that the Department could expand the number of data bases and systems which permit or accept the addition of inmate religious names, ACA's and AKA's.

I declare under penalty of perjury and the laws of the United States that the forgoing is true and correct. Executed this 14th Day of August, 1997 at Sacramento, California.

/S/
Larry Wagner

APPENDIX E

FILED
CLERK U.S. DISTRICT COURT
JULY 24, 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Plaintiff, v. JAMES GOMEZ, Director of Corrections, et al., Defendants.	Civil No.: CV 95-1764-KMW (Mc) PARTIAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE IN A CIVIL RIGHTS CASE

This Partial Report and Recommendation is submitted to the Honorable Kim M. Wardlaw, United States District Judge, pursuant to 28 U.S.C. § 636 (b) (1) (B) and General Order 194 of the United States District Court for the Central District of California.

BACKGROUND

The pro se plaintiff, a state prisoner, filed this civil rights action pursuant to 42 U.S.C. § 1983, claiming that California prison officials have violated his right to the free exercise of his religion under the First Amendment and the California Constitution.

The defendants are: James Gomez, the Director of the California Department of Corrections ("CDC"); G. Bonnie Garibay, CDC Chief, Inmate Appeals; CDC Appeals Examiner V. Bluestein;[1] John M. Ratelle, Warden at the California State Prison, Los Angeles County (Lancaster) ("CSP-Los Angeles County"); Mike Yarborough, Associate Warden at CSP-Los Angeles County; and CSP-Los Angeles County Correctional Counselors D. Felix, D. Lorenzen and D. Whyte.

The plaintiff was originally convicted of murder and sentenced to the state prison under the name Felton Lee Guillory ("the committed name"). In March of 1992, a California Superior Court allowed the plaintiff to change his name to Shomari Naeem Shuaibe ("the religious name"). In his unverified complaint, the plaintiff alleges that, in 1994 while at CSP-Los Angeles County, prison officials refused to accord the plaintiff privileges, services, and medical attention under his religious name. The plaintiff claims that he filed a "602" inmate appeal with defendant Whyte, stating that the plaintiff is Muslim, and requesting that the plaintiff be allowed "visits, medical care, 'R&R services,' canteen, I.D. cards and correspondence with the Administration in [his] Religious, Court ordered name." The plaintiff also allegedly requested that his religious name be placed in his central file and in the prison computer. The plaintiff claims that defendant Whyte denied this appeal.

1 According to the defendants, defendant Bluestein died after the filing of this action.

The plaintiff alleges that defendants Felix and Yarborough denied his appeal at the next level of review. Defendant Ratelle allegedly approved the denial of the plaintiff's appeal. Defendants Bluestein and Garibay allegedly denied the plaintiff's appeal at the director's level. Defendant Gomez is sued because he is allegedly responsible for the promulgation and enforcement of CDC rules and for the behavior of his subordinates. The plaintiff seeks injunctive and declaratory relief, and damages. Attached to the complaint are copies of documents concerning the alleged appeals, as well as other documents allegedly evidencing the plaintiff's name change.

On June 21, 1995, the defendants filed an answer. On December 10, 1996, the defendants filed a motion for summary judgment. On December 17, 1996, the court issued and Order re Plaintiff's Response to Summary Judgment Motion, advising the plaintiff of the requirements of Rule 56 of the Federal Rules of Civil Procedure, and of his need to respond to the defendants' motion by presenting evidence setting forth specific facts showing the existence of a genuine issue for trial.[2] On January 16,1997, the court received from the plaintiff a motion for summary judgment. On January 16, 1997, the court ordered the plaintiff's motion taken off calendar as untimely. In the meantime, however, on January 14, 1997, the defendants filed an opposition to the plaintiff's motion for summary judgment. On

2 See Klingele v. Eikenberry, 849 F.2d 409, 411-412 9th Cir. (1988).

January 27, 1997, the plaintiff filed an opposition to the defendants' motion for summary judgment.

On February 11, 1997, the plaintiff filed an ex parte motion for leave to have his summary judgment motion placed back on the court's calendar, asserting that he had mailed his motion for summary judgment on the last day of the motion cut-off deadline. On February 12, 1997, the court denied the ex parte motion on the ground that the plaintiff's proof failed to establish that he had timely mailed his motion for summary judgment. On March 19, 1997, the plaintiff filed a second ex parte motion for leave to have his summary judgment motion placed back on calendar.

In the meantime, at least two documents mailed to the plaintiff by the Clerk of the Court and addressed to Shomari N. Shuaibe, the plaintiff's religious name, were returned undelivered, on the ground of "Unable to Locate by CDC Number - - Name and CDC# Do Not Match." One of these documents was the court's order of December 17, 1996 advising the plaintiff of the requirements of Rule 56 of the Federal Rules of Civil Procedure and of his need to respond to the defendants' motion by presenting evidence setting forth specific facts showing the existence of a genuine issue for trial. On April 4, 1997, the court issued an order granting the defendants leave to file an opposition to the plaintiff's ex parte motion. Also on April 4, 1997, the court issued another order advising the plaintiff of the requirements of Rule 56 of the Federal Rules of Civil Procedure, and of his need to respond

to the defendants' motion by presenting evidence setting forth specific facts showing the existence of a genuine issue for trial. On April 23, 1997, the defendants filed a statement of non-opposition to the plaintiff's second ex parte motion for leave to have his motion for summary judgment placed back on calendar. On May 2, 1997, the plaintiff filed a supplemental opposition to the defendants' motion for summary judgment.

DISCUSSION

I. The Plaintiff's Motion for Summary Judgment Was Timely Filed and Should Be Considered by the Court.

The parties do not dispute that the plaintiff's motion for summary judgment was sent from the prison mailroom on December 16, 1996, the first court day after the motion cut-off date (which was a Sunday). Therefore, the court deems the plaintiff's motion for summary judgment timely filed. See Houston v. Lack, 487 U.S. 266, 276, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988); Faile v. Upjohn Co., 988 F.2d 985, 988 (9th Cir. 1993).

II. Summary of Parties' Contentions

The defendants contend: (1) the plaintiff has not produced evidence to show a violation of his rights under the Religious Freedom Restoration Act,[3] because the plaintiff has not shown that his name change was a religious practice central to his religion; (2) the plaintiff has no constitutional right to substitute his religious name for his committed name

3 42 U.S.C. § 2000bb et seq.

in prison records; (3) the Eleventh Amendment bars the plaintiff's suit for damages against the defendants in their official capacities; (4) the plaintiff has no damage remedy under the Religious Freedom Restoration Act; (5) the plaintiff has failed to plead specific acts showing that the defendants caused the alleged constitutional violation; (6) the plaintiff has failed to exhaust remedies as required by the Prison Litigation Reform Act of 1995;[4] (7) the plaintiff has shown no entitlement of injunctive relief; (8) the plaintiff has failed to plead a cognizable conspiracy claim; (9) the plaintiff has failed to plead compliance with the filing fee requirements of the Prison Litigation Reform Act; (10) the defendants cannot be held liable on a theory of respondeat superior; (11) the defendants are shielded by qualified immunity; and (12) any supplemental state law claims should be dismissed. In their opposition to the plaintiff's motion for summary judgment, the defendants argue: (1) the plaintiff has not show compliance with the exhaustion requirements of the Prison Litigation Reform Act; and (2) the defendants are protected by qualified immunity.

In his motion for summary judgment and his opposition to the defendants' motion, the plaintiff contends that: (1) the plaintiff has exhausted his administrative remedies; (2) the plaintiff's use of his religious name was and is an expression of his religious faith; and (3) the defendants have unconstitutionally denied the plaintiff the opportunity to use both his

4 Pub. L. No. 101-134, 110 Stat. 1321 (eff. Apr. 26, 1996).

religious and his committed names. The plaintiff requests injunctive relief in the form of an order requiring the defendants to permit the plaintiff: (1) to use both his religious and his committed names on identification and privilege cards; (2) to receive visits, medical attention and food from the canteen in his religious name; and (3) to receive articles from the "R & R" and money from home in his religious name. The plaintiff further requests an order requiring the defendants to enter the plaintiff's religious name in the prison computer and in his central file.

In their opposition to the plaintiff's cross-motion for summary judgment, the defendants ask the court to take judicial notice of the evidence filed by the defendants in support of their motion for summary judgment. Because it would be a waste of the resources and time of the court and the parties to require the defendants to resubmit the same evidence in their opposition to the plaintiff's cross-motion, the court takes judicial notice of these documents. See Fed. R. Evid. 201. In the interest of fairness, the court also takes judicial notice of evidence submitted by the plaintiff in his opposition to the defendants' motion for summary judgment, for purposes of assessing the merits of the plaintiff's cross-motion for summary judgment.

III. Standards Governing Summary Judgment

Summary judgment is appropriate if the evidence, viewed in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue of material fact and that the moving party is entitled to

judgment as a matter of law. Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of offering proof of the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 274 (1986). "[T]he burden on the moving party may be discharged by 'showing' - - that is, pointing out to the district court - - that there is an absence of evidence to support the nonmoving party's case." Id. at 325, 106 S.Ct. at 2554, 91 L.Ed.2d at 275. Once this burden is met, the party opposing the motion is required to go beyond the pleadings and, by the party's own affidavits or by other evidence, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Hansen v. United States, 7 F.3d 137, 138 (9th Cir. 1993). The party opposing the motion must submit evidence sufficient to establish the elements that are essential to that party's case, and for which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S.Ct. at 2552, 91 L.Ed.2d at 273. To show the existence of a genuine issue, the plaintiff " 'must produce at least some significant probative evidence tending to support the complaint.' " Smolen v. Deloitte, Haskins & Sells, 921 F.2d 959, 963 (9th Cir. 1990) (citation omitted).

Only admissible evidence may be considered by the court in ruling on a motion for summary judgment. Beyene v. Coleman Security Services, Inc., 854 F.2d 1179, 1181-1182 (9th Cir. 1988). A motion cannot be supported or opposed by the use of conclusory declarations unsupported by

factual allegations. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The inferences drawn from the underlying facts must be construed in the light most favorable to the party opposing the motion. Valandingham v. Bojorquez, 866 F.2d 1135, 1137 (9th Cir. 1989). Where different ultimate inferences can be drawn, summary judgment is inappropriate. Sankovich v. Life Ins. Co. of North America, 638 F.2d 136, 140 (9th Cir. 1981).

A factual dispute is "genuine" only if there is a sufficient evidentiary basis upon which a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is "material" only if it might affect the outcome of the lawsuit under governing law. Id. at 248.

In the event the court does not enter summary judgment on the whole case, Rule 56(d) of the Federal Rules of Civil Procedure authorizes the court to ascertain from the record what material facts exist without substantial controversy, and to issue an order specifying the facts that appear without substantial controversy. See also Rule 7.14.4, Local Rules of Practice of the United States District Court for the Central District of California.

IV. The Plaintiff Has Sufficiently Exhausted Administrative Remedies.

Under the Prison Litigation Reform Act of 1995 ("PLRA"), signed into law on April 26, 1996, a prisoner plaintiff is required to exhaust

available administrative remedies prior to bringing suit for violation of his civil rights. See 42 U.S.C. § 1997e(a) (as amended). The defendants contend the plaintiff has not satisfied this exhaustion requirement because he failed to comply with the presentment of claim procedures of the California Tort Claims Act, Cal. Gov't Code § 905.2.

This action was filed over a year before the effective date of the PLRA. The exhaustion requirements of the PLRA should not be applied retroactively. See Wright v. Morris, 111 F.3d 414, 423 (6th Cir. 1997), pet. for cert. filed, 65 U.S.L.W. 3783 (May 8, 1997) (PLRA's exhaustion requirements inapplicable to appeals pending on date of enactment). In any event, the plaintiff has shown compliance with the administrative remedies procedure of the California Department of Corrections (Complaint, Exhibit A; Answer, ¶¶ 3, 4, 8, and 9).

Even if the PLRA's exhaustion requirements applied to the plaintiff's claim, those requirements would not compel the plaintiff to "exhaust" state tort claims act remedies. Congress clearly intended to require exhaustion of prison grievance procedures. See Report on the Activities of the Committee on the Judiciary, H.R.Rep. 104-879 (January 2, 1997) (PLRA "requires prisoners to exhaust the administrative remedies established by the corrections system before they may file a lawsuit in federal court"); see also 141 Cong. Rec. S7498-01, at S7527 (remarks of Senator Kyl) (noting that many prisoners seek relief for matters as to which

the "prison grievance system" supplies an adequate remedy). There is no indication Congress intended legislatively to overrule Felder v. Casey, 487 U.S. 131, 140-141, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (holding that notice-of-claim statutes are inapplicable to federal court § 1983 litigation). Therefore, summary adjudication should be granted in favor of the plaintiff on the issue of exhaustion of administrative remedies. See Fed. R. Civ. P. 56(d); Rule 7.14.4, Local Rules of Practice of the United States District Court for the Central District of California.

V. Plaintiffs Alleged Non-Compliance with the Filing Fee Provisions May 22, 2000 of the PLRA Does Not Justify a Grant of Summary Judgment for the Defendants.

The defendants offer no justification for their apparent position that the plaintiff's alleged failure to comply with the filing fee requirements of the PLRA warrants a grant of summary judgment in their favor. The plaintiff's asserted non-payment of the fee does not demonstrate the absence of a genuine issue for trial within the meaning of Fed. R. Civ. P. 56. Whether the court is or is not collecting its filing fee is irrelevant to the issue whether summary judgment for the defendants is appropriate.

VI. Summary Adjudication Should Be Granted in Favor of the Plaintiff on the Issue Whether the Use of the Religious Name is an Expression of the Plaintiff's Religious Faith.

The defendants claim that the plaintiff has not shown that denying the plaintiff the ability to use his religious name interferes with a tenet or belief central to his faith, as required by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. ("RFRA"). See Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995).[5] On June 25, 1997, the Supreme Court ruled RFRA unconstitutional. City of Boerne v. Flores, __ U.S. __, 65 U.S.L.W. 4612, 1997 WL 345322 (June 25, 1997). Therefore, RFRA is inapplicable.

The Ninth Circuit has recognized that the adoption of a religious name by a member of the Muslim faith may be considered to be an expression of religious faith. See Malik v. Brown, 16 F.3d 330, 335 (9th Cir. 1994) (Malik I), mandate recalled and opinion supplemented, 65 F.3d 148 (9th Cir. 1995) (Malik II); see also Malik v. Brown, 71 F.3d 724, 727 (9th Cir. 1995) (Malik III) ("In 1987, the Fifth Circuit recognized that '[t]he adoption of Muslim names by inmates practicing that religion is generally recognized to be an exercise of both first amendment speech and religious freedom [citation]"). The plaintiff states in his sworn opposition that the use of his religious name reflects the attributes of God and is part of his religious

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5 Congress enacted RFRA in response to the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L. Ed.2d 876 (1990), a free exercise case which, according to Congress, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion. . . ." 42 U.S.C. § 2000bb(a). RFRA's declared purpose was to "restore the compelling state interest test as set forth in Sherbert v. Verner, 374 U.S. 298, 83 S.Ct. 1790, 10 L.Ed.2d. 965 (1963) and Wisconsin v. Yoder , 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened . . . ." 42 U.S.C. § 2000bb(b).

experience and belief (Plaintiff's Opposition, pp. 5-6). The defendants rely upon Warden Yarborough's declaration testimony that the Muslim chaplain at the prison has never informed Yarborough that the Muslim faith requires members to change their names as a central tenet of their faith, and has never informed Yarborough that Muslim inmates must have their religious names on their prison identification cards (Declaration of M. Yarborough, ¶ 10). The alleged fact that the Muslim chaplain has not so informed Yarborough is not probative of whether the plaintiff's use of his legal, religious name is an expression of his religious faith. Therefore, there is no evidence to controvert the plaintiff's sworn statement that the use of his legal, religious name is an expression of his faith. Summary adjudication should be granted in favor of the plaintiff and against the defendants on the issue that the plaintiff's use of his religious name is protected religious expression.

VII. A Genuine Issue of Fact Exists as to Whether the Plaintiff Sought to Require Prison Officials to Use Only His Religious Name or to Use Both His Religious and His Committed Names; Therefore, Summary Judgment is Inappropriate on the Plaintiffs' Claim for Damages.

In Malik I, the Court of Appeals for the Ninth Circuit held that a prisoner's First Amendment rights were violated when prison officials disciplined the plaintiff for using his religious name on incoming and outgoing correspondence:

> "[W]e agree that the state has a legitimate interest in continued use of an inmate's committed name. But we see no legitimate penological interest in preventing Malik from using both his religious name and his committed names.
>
> . . .
>
> Malik's adopting of a Muslim name is an expression of his religious faith. He is entitled to use both his religious and his committed names on correspondence, on legal documents, and in his daily affairs.

Malik v. Brown, 16 F.3d at 334, 335.

Under Malik I, then, the plaintiff has a right to use both his committed name and his legal, religious "in his daily affairs." Applying the reasonableness test set forth in Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) and O'Lone v. Estate of Shabazz, 482 U.S. 342, 348, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987), the court in Malik I saw no legitimate penological interest in preventing Malik from using both his religious and committed names. Malik v. Brown, 16 F.3d at 334. However, Malik I does not support the proposition that a prisoner has a right to use only his religious, legal name as identification in prison. See also Fawaad v. Jones, 81 F.3d 1084, 1087 (11th Cir. 1996) (prison policy requiring Islamic inmate to use both religious name and committed name on incoming and outgoing mail did not violate prisoner's First Amendment rights).

In his verified memorandum of points and authorities, the plaintiff

asserts that, when he appears before the prison classification committee, he is identified by the name on his central file, which is his committed name only (Plaintiff's Memorandum of Points and Authorities, p. 12). The plaintiff further asserts that, when he is asked to identify himself to receive personal property, or to obtain medical attention, canteen visits or visitation, he must present his privilege card and identification card, both of which contain only committed name (id). The plaintiff claims he is prevented from conducting his daily affairs "in both of his names" (id.). The defendants have submitted no evidence to controvert these sworn statements.[6]

According to the defendants, the plaintiff's initial claim to prison officials and in prison administrative proceeding is that he is entitled under the First Amendment to require the defendants to discontinue the use of the plaintiff's committed name entirely. If this were a correct characterization of the plaintiff's claim, nothing in Malik would support such a claim. Certainly prison officials are entitled, in the interest of security, to maintain records on a prisoner identifying him by the name under which he was committed. See Fawaad v. Jones, 81 F.3d at 1087.

The defendants who denied the plaintiff's administrative appeals state in their declarations that the plaintiff sought to have his committed

6 The defendants' argument that a subsequent change in prison policy now permits inmates to use new legal names for visiting and mail purposes is irrelevant to the plaintiff's claim for damages for alleged denial of these services prior to the change, and is irrelevant to the plaintiff's claim that he was denied other services and benefits.

name "replaced with" his religious name. See Declaration of D. Felix, ¶ 2; Declaration of D. Lorenzen ¶ 2; Declaration of J.M. Ratelle, ¶ 2; Declaration of M. Yarborough, ¶ 2.[7] The actual administrative appeal documents, however, do not indicate unambiguously that the plaintiff sought complete "replacement" of his committed name with his legal, religious name. In his initial appeal, the plaintiff complained that he was being "forced to use a religiously-offensive name" to receive privileges such as family visits and use of the canteen (Complaint, Exhibit A; Defendants' Exhibit 6). The appeal stated that the plaintiff's identification card contained "only" the offensive committed name. The plaintiff requested that he be issued an identification card and a privilege card that "reflected" his legal name, and that his legal name be "reflected" on his central file and in the prison computer records. The plaintiff did not request that his committed name be "replaced by" his religious name. The plaintiff signed various appeals using first his legal, religious name, followed by the plaintiff's commitment name, listed as an "AKA."

In denying the plaintiff's administrative appeals, the defendants relied upon a CDC Departmental Operations Manual ("DOM") provision. As of 1994, DOM section 73010.6.1 provided that, where an inmate obtained a legal name change, the new legal name was to be recorded on

7 The court cannot consider the Declaration of defendant G.B. Garibay because is it not executed.

prison records as "ACA" ("also committed as") (Defendants' Motion, Exhibit "C" to Declaration of Malich). DOM section 73010.6.1 also provided: "Records of inmates who subsequently receive a court-ordered legal name change shall continue to use the commitment name as provided above" (id.). In 1995, this provision was amended to state that an inmate's new legal name may be used by the inmate for mail and visiting purposes (Defendants' Motion, Exhibit "D" to Declaration of Malich). Although the amended provision does not state that both names must be used, it appears the defendants have interpreted this provision to mean that the inmate can have his new legal name listed as an "ACA" for purposes of mail and visiting (see Declaration of M. Yarborough, ¶ 9).

The DOM provision, even as amended, does not indicate the new name may be used on identification cards or for the purposes of obtaining other prison benefits and services as the plaintiff requests. In any event, the record shows that, in 1994, the defendants relied upon the original version of this DOM section to deny the plaintiff the ability to us his legal, religious name to obtain benefits and services.

The administrative appeals documents are somewhat ambiguous as to whether the plaintiff sought to have his religious name replace his committed name, or merely wanted to be able to use both names. In his response to the plaintiff's appeal, defendant Whyte stated: "The legal paperwork from the Superior Court changing your name is in file but you

were committed under Guillory and you will remain Guillory while in CDC" (Complaint, Exhibit A; Defendants' Exhibit 6). At the first formal level of review, defendant Lorenzen responded: "Current CDC policy dictates that the name under which you are committed is the name under which you will be identified with by [sic] the California Department of Corrections. All other names used either prior to or subsequent to your incarceration will be listed in your C-File as AKA's" (id.). Defendant Warden Ratelle denied the plaintiff's appeal on the basis of DOM section 73010.6.1, stating that records of inmates who receive a court-ordered legal name change subsequent to incarceration would continue to use the commitment name, and the new legal name would be recorded as "also known as" (AKA)" (Complaint, Exhibit A).[8]

Defendants Bluestein and Garibay, reviewing the appeal at the CDC level, characterized the plaintiff's claim as a claim that the CDC "change its records so that [the plaintiff's] legally changed name . . . is used in CDC files and documents" (id.). Bluestein and Garibay denied the plaintiffs' appeal on the ground that plaintiff did not "provide substantiation of his claim that his court-ordered legal name should be used in CDC documents" (id.)

8 As noted above, in their answer, the defendants admitted that the plaintiff's various appeals were denied (Answer , ¶¶ 3, 4, 8, and 9), and did not deny the accuracy of the appeals documents attached as exhibits to the complaint.

Defendant Whyte states in his declaration that he was the plaintiff's correctional counselor at the time the plaintiff filed his appeal, and that he spoke personally with the plaintiff (Declaration of D. Whyte, ¶ 2). According to Whyte, the plaintiff did not want his religious name listed as an "also committed as" appellation, and did not want his committed name to appear on any CDC or prison documents (Declaration of D.Whyte, ¶ 2)

There is evidence to controvert this statement. The plaintiff contends that he did not and does not want the defendants to discontinue the use of the plaintiff's committed name entirely. The plaintiff explains that he wants his legal, religious name to be reflected on his identification and privilege cards, and in his central file "along with the commitment name if the Government insists on that" (see Plaintiff's Opposition, pp. 4, 8; Plaintiff's Supplemental Opposition, pp. 4, 8).

A genuine issue of fact exists as to whether, in the period of time from the beginning of this dispute through the time of the plaintiff's administrative appeals, the plaintiff requested that his legal, religious name be used in addition to, rather than as a replacement for, his commitment name. In their opposition to the plaintiff's motion for summary judgment, the defendants acknowledged the existence of this factual issue, arguing that Whyte's declaration created a genuine issue of fact concerning the nature of the plaintiff's request. If the plaintiff did request that he be able to access prison services using both names, and if the defendants denied this request,

then, subject to application of the doctrine of qualified immunity (discussed below), the plaintiff could show a violation of his right to the free exercise of his religion. An almost identical factual dispute caused the Ninth Circuit's remand in Malik I. See Malik v Brown, 16 F.3d at 334-335. Therefore, both the plaintiff's motion for summary judgment and the defendants' motion for summary judgment should be denied on this issue.

VIII. The Existence of a Genuine Issue of Fact Concerning the Nature of the Plaintiff's Claim Precludes Application of the Doctrine of Qualified Immunity on this Motion.

"The qualified immunity test requires a two part analysis: '(1) Was the law governing the official's conduct clearly established? (2) Under that law, could a reasonable officer have believed the conduct was lawful?" Schroeder v. McDonald, 55 F.3d 454, 461 (9th Cir. 1995); See Act Up!/Portland v. Bagley, 988 F.2d 868, 871 (9th Cir. 1993). Qualified immunity does not protect state officials from liability for injunctive relief. See Malik v. Brown, 16 F.3d at 335 n. 4.

Malik I was decided approximately a month before the plaintiff filed his initial administrative appeal. The Ninth Circuit subsequently visited the issue of the applicability of qualified immunity in that case . In Malik III, a 1995 case, the court reviewed the law for the past sixteen years, and held that, for purposes of qualified immunity analysis, and inmate's First Amendment right in "using new his new, legal name (at least in

conjunction with his committed name)" was clearly established in 1990 when Malik was disciplined. Malik v. Brown, 71 F.3d at 729-739. Tellingly, the law canvassed by the circuit was not limited to cases replicating the facts of Malik. For example, the court cited Ali v. Dixon, 912 F.2d 86 (4th Cir. 1990). In Ali, prison officials modified the visitors' list to reflect the prisoner-plaintiff's religious and committed names, and added his new name to the mailroom list. However, the plaintiff alleged, among other things, that the new name was not added to his prison jacket or trust fund card. The court reversed a grant of summary judgment for the defendants, ruling, inter alia, that if the plaintiff had been forced to use only his old religiously offensive name to obtain access to his trust account or other benefits, his first amendment rights had been violated. Id. at 90.

The court denied qualified immunity to the defendants in Malik III on the ground it would have been unreasonable for them to have denied Malik the right to use both his religious and his committed names for mail purposes. It would have been similarly unreasonable for the defendants here to deny the plaintiff the right to obtain services such as medical attention, visitation and canteen privileges in both names.

The brief for the defendants in this action laments the fact that no petition for rehearing en banc was filed in Malik II, and theorizes that "the law may not have been clearly established as the majority in Malik II [sic] believed" (Defendants' Memorandum of Points and Authorities, pp. 13-14

and fn. 7). The defendants also rely upon the dissent in Malik III (Defendants' Opposition to Plaintiff's Motion for Summary Judgment, p. 8). Malik I and Malik III compel the conclusion that it was "clearly established" law, in 1994 when the alleged events in this action occurred, that prison officials could not constitutionally deny an inmate the right to use his religious, legal name, in addition to his committed name, in order to obtain prison services or benefits.

However, the law Malik III acknowledged as "clearly established" did not include a prisoner's right to use only his religious name. As discussed above, a genuine issue of fact exists as to whether the plaintiff requested that he be allowed to use his legal, religious name in addition to, as opposed to in place of, his committed name, Therefore, summary judgment is inappropriate on the issue of qualified immunity.

IX. The Plaintiff Is Entitled to the Prospective Relief of Using His Legal, Religious Name in Addition to His Committed Name.

As discussed above, a genuine issue of fact exists as to whether the plaintiff requested that prison officials substitute his religious name for his committed name, or whether he requested that prison officials allow him to use his religious name in addition to his committed name. This issue of fact is relevant to the issues of liability for damages and qualified immunity. However, regardless of what the plaintiff requested in 1994, it is undisputed

that, at present, the plaintiff does not seek substitution of his religious name for his committed name. Rather, the plaintiff seeks to be able to use his legal, religious name, as well as his committed name, on his identification card and privilege card, to receive mail, services and benefits in his religious name as well as his committed name, and to have his religious name added to the prison computer and his central file (see Plaintiff's Opposition, p. 4). The plaintiff does not claim CDC files should be altered so as to reflect his religious name as his principal name, rather than as an "ACA." The defendants do not controvert the plaintiff's statements that, at present, he seeks this prospective relief.

The defendants argue that the plaintiff has not proffered evidence showings his entitlement to injunctive or declaratory relief, because: (1) the plaintiff has not demonstrated his constitutional rights have been violated; (2) the plaintiff has not "made a convincing case" of a threat of any future violation; and (3) there is no ongoing substantial controversy between the parties.

The defendants have not offered evidence of any legitimate penological reason why the plaintiff should not be allowed to use his religious name as well as his committed name. The defendants' argument that changing their records to reflect the plaintiff's legal, religious name would "wreak havoc" is based upon a one-page "fact sheet" listing statistical information about the California Department of Corrections, which is

inadmissible, being purportedly authenticated by defendants' counsel, who neither states the basis for her personal knowledge about the document nor attests that the exhibit is a true and correct copy (Declaration of Malich, Exhibit E). Although defendant Ratelle states in his declaration that CDC computers are not designed to accept more than one committed name (see Declaration of J.M. Ratelle, ¶ 8), the plaintiff does not request that his committed name be eliminated, and in any event the CDC's own departmental manual (DOM section 73010.6.1) requires that a prisoner's legal name change be reflected as an "ACA" on prison records.[9]

The defendants also claim "safety and security considerations" justify their behavior, claiming that one CDC inmate recently was able to change his name to that of another for harassment purposes, and that inmate name changes can generate errors resulting in improper release or inability to make security checks (Deceleration of J.M. Ratelle, ¶ 9). These conclusory and speculative statements do not justify the defendants' refusal to allow the plaintiff to use both names as required by Malik I. See also Barrett v. Commonwealth of Virginia, 689 F.2d 498, 501-502 (4th Cir. 1982) (rejecting states's claim that recognizing prisoner's Muslim name would

9 In their unsworn Memorandum of Points and Authorities, the defendants indicate that the CDC is presently involved in a "multi-year effort to develop a method of computerizing certain inmate central file records and information". (Defendants, Memorandum of Points and Authorities, p. 13). The defendants do not explain how this fact, if true, compels the conclusion that adding the plaintiff's religious name to his computer file as an "ACA" would impair this alleged computerization effort.

disrupt identification, cause confusion in internal prison operations and hinder efforts to recapture escapees).

The defendants claim they should not be required to alter their records to reflect the plaintiff's new name, arguing that Malik III, acknowledged prior precedent supporting the defendants' position. (In Malik III, the court acknowledged cases standing for the proposition that an inmate could not compel a prison to reorganize its filing system to reflect his new name, citing Barrett v. Commonwealth of Virginia, supra, and Akbar v. Canney, 634 F.2d 339 (6th cir. 1980), cert. denied, 450 U.S. 1002, 101 S.Ct. 1712, 68 L.Ed.2d 205 (1981). Malik v. Brown, 71 F.3d at 727. Barrett held that Virginia's policy of refusing to recognize prisoner' Muslim names was unconstitutional, but that the state was not required to reorganize its files using the prisoner's religious name as the "principal appellation," and reflecting committed name as alias. The plaintiff here does not request such relief. Barrett v. Commonwealth of Virginia, 689 F.2d at 503. In Akbar, in a situation in which the court declined to require prison officials to show the prisoner's religious name, the court specifically noted that Akbar did not claim he had been denied any prison benefit because of the use of the new name. Akbar v. Canney, 634 F.2d at 340. Here, it is undisputed that the defendants have refused to provide the plaintiff with identification and privilege cards bearing both names, and that, because of this refusal, the plaintiff cannot access prison services and benefits except through the use of

his religiously-offensive committed name. Under these circumstances, addition of the plaintiff's legal, religious names, to prison records and means of identification is necessary to preserve the plaintiff's First Amendment rights.

The defendants argue that the presently applicable version of DOM Section 73010.6.1 already entitles the plaintiff to receive mail and visitation in his religious name; however, they provide no evidence to controvert the plaintiff's sworn statement that he has "totally" been denied visitation in his religious name, and only receives mail in his religious name whenever mailroom personnel allow it (Plaintiff's Opposition, p. 4). In fact, the court's own mail to the plaintiff in his religious name has been returned on two occasions undelivered. Moreover, the defendants do not argue or present evidence that the plaintiff now has identification and privilege cards reflecting both names, or that services and benefits are now being provided to the plaintiff in both names.

The plaintiff has demonstrated by uncontroverted evidence that the defendants are violating plaintiff's free exercise rights insofar as the defendants continue to deny the plaintiff the ability to use his religious name, in addition to his committed name, as identification and to obtain benefits and services. Therefore, summary judgment should be granted in favor of the plaintiff, and against the defendants, on the issue of the

defendants' liability for violation of the plaintiff's right to free exercise of his religion.

The plaintiff requests that this court issue and injunction ordering the defendants to: (1) allow the plaintiff to use identification and privilege cards bearing both his legal, religious name and his committed name; (2) identify the plaintiff in prison computer records and in his central file by his committed name and also by his legal religious name, whether by an "ACA" designation or otherwise; and (3) allow the plaintiff to receive mail services, visitation, medical care, otherwise appropriate deliveries of money or other items from non-prisoners, and other prison services and benefits in his religious name as well as his committed name. The issue of the appropriate scope of injunctive relief has neither been raised or briefed in these proceedings. Therefore, at this time, the court will not decide the appropriate scope of a permanent injunction. Notwithstanding the expiration of the motion cut-off date, the plaintiff may make a motion for issuance of injunctive relief, describing the scope of any requested injunction. The defendants may then respond to any such motion in accordance with the applicable provisions of the Federal Rules of Civil Procedure and Local Rules of Practice of this court regarding motion practice. To repeat, the entry of summary judgment in the plaintiff's favor on the issue of liability will not constitute a remedial order at the time of the grant of the summary judgment.

IX. The Plaintiff Has Not Demonstrated the Personal Involvement of Defendant Gomez Sufficient to Warrant Imposition of Liability for Damages; However, Defendant Gomez Remains a Proper Defendant Insofar as the Plaintiff Seeks Injunctive Relief.

The defendants claim that the plaintiff has failed to plead specific facts showing the defendants caused the alleged constitutional violation, and that the defendants cannot be held liable on a theory of respondeat superior. The only defendant sued on a theory of resopondeat superior is CDC Director Gomez. The plaintiff's evidence, including the appeals documents, is sufficient to show that the other defendants were "personally involved" in the alleged constitutional violation. See Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989).

Respondeat superior is not a theory of liability available under 42 U.S.C. § 1983. Polk County v. Dodson, 454 U.S. 312, 325, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). However, a state official with the statutory duty to enforce and administer an allegedly unconstitutional policy is a proper defendant in a suit for prospective injunctive relief. See Chaloux v. Killeen, 886 F.2d 247, 251-252 (9th Cir.1989). Therefore, defendant Gomez is a proper party defendant insofar as the plaintiff seeks injunctive relief.

There is no evidence that defendant Gomez was personally involved in the denial of the plaintiff's appeals. A supervisor may be held liable for creating a policy which resulted in the alleged unconstitutional

conduct. Hansen v. Black, 885 F.2d at 646 (supervisor may be liable if he "implements a policy so deficient that the policy is itself a violation of constitutional rights and is the moving force of the constitutional violation"). However, the plaintiff has produced no evidence indicating defendant Gomez was instrumental in creating or implementing any policy which prevented the plaintiff from using his religious name. Therefore, summary adjudication should be granted in favor of defendant Gomez insofar as the plaintiff asserts a claim for damages against Gomez.

X. The Defendants May Be Sued For Damages in Their Individual Capacities, But Not in Their Official Capacities.

The Eleventh Amendment bars suits for money damages against state officials in their official capacities. See Will v. Michigan Department of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Therefore, summary adjudication should be granted in favor of the defendants to the extent the plaintiff asserts a claim for damages against the defendants in their official capacities.

However, the defendants may be sued in their individual capacities. Moreover, the plaintiff may sue the defendants in their official capacities for prospective injunctive relief. See id., 491 U.S. at 71 n. 10; Kentucky v. Graham, 473 U.S. 159, 169 n. 18, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); Ex parte Young, 209 U.S. 123, 159-160, 28 S.Ct. 441, 52 L.Ed.

714 (1908); Los Angeles County Bar Ass'n v. Eu, 979 F.2d 697, 704 (9th Cir. 1992).

XI. The Conspiracy Claim Should Not Be Dismissed.

The defendants' contention that the complaint insufficiently pleads conspiracy is an argument more appropriately raised by a motion to dismiss pursuant to Fed. R. Civ. P. 12(b) (6), rather than by motion for summary judgment. Because the defendants chose to answer the complaint rather than to challenge its sufficiency in a pre-answer motion, technically the defendants' motion should be treated as a motion for judgment on the pleadings. See Fed. R. Civ. P. 12(h) (2); 12 (c). R. Civ. P. 12 (b) (6); Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1980). The motion is governed by the test used to assess the sufficiency of the complaint under Fed. R. Civ. P. 12(b) (6). McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988); Ludahl v. Seaview Boat Yard, 869 F.Supp. 825, 826 (W.D.Wash. 1994).

The defendants' motion is premised solely on the argument that the plaintiff's conspiracy claim is conclusory. While conclusory allegations are generally considered insufficient, the purpose of requiring more specificity is to provide notice to the defendant of the nature of the claim, and to permit the defendant to frame an appropriate response. The plaintiff

essentially bases his conspiracy claim on the defendants' acts of uniformly denying his appeals (Complaint, ¶¶ 48-56).

It does not appear that the alleged conclusory conspiracy claim rendered the defendants unable to understand the plaintiff's complaint so as to be able to mount a defense. The defendants have filed an answer, opposed the plaintiff's motion for judgment on the pleadings, engaged in discovery, filed a motion for summary judgment, and filed an opposition to the plaintiff's motion for summary judgment. If the court were to conclude these allegations insufficient to state a conspiracy claim, the court might well be required to afford the plaintiff leave to amend his complaint. See Karim-Panahi v. Los Angeles Police Department, 839 F.2d 621, 623 (9th Cir. 1988). However, the discovery and motion cut-off dates have expired. Under these circumstances, and at this stage of the proceedings, dismissal of the plaintiff's conspiracy claim on the ground it is conclusory is inappropriate.

The defendants have not argued that the evidence shows the absence of a genuine issue of fact regarding the plaintiff's conspiracy claim. Therefore, the court should deny the defendants' motion insofar as it purports to be a motion for summary judgment on the plaintiff's conspiracy claim.

XII. The Court Should Not Determine at this Time the Propriety of

Exercising Supplemental Jurisdiction Over the Plaintiff's State Constitutional Claim.

Under the supplemental jurisdiction statute, a federal court may decline to exercise supplemental jurisdiction over a state law claim where "(1) the claim raises a novel or complex issue of state law; (2) the claim "substantially predominates" over the claim or claims over which the district court has original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." 28 U.S.C. § 1367(c); see O'Connor v. State of Nevada, 27 F.3d 357 (9th Cir. 1994), cert. denied, 514 U.S. 1021, 115 S.Ct. 1367, 131 L. Ed.2d 223 (1995).

The defendants urge the court to decline to exercise supplemental jurisdiction over the plaintiff's claim for violation of the California Constitution, on the ground that, because the defendants are entitled to summary judgment on the plaintiff's federal constitutional claim, the exercise of jurisdiction over the state constitutional claim would be inappropriate under 28 U.S.C. § 1367 (c)(3). Because the court has not dismissed all claims upon which federal jurisdiction may be based, section 1367 (c) (3) is inapplicable.

However, for another reason, the court may not exercise jurisdiction over the plaintiff's state law claims for injunctive relief. The Eleventh Amendment bars this court from exercising jurisdiction to order state

officials to conform their conduct to state law. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 106, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). However, the Eleventh Amendment does not bar the court from hearing a claim against state officials for damages for violation of state law. Pena v. Gardner, 976 F.2d 469, 474 (9th Cir. 1992).

The defendants argue, in the alternative, that they are entitled to summary judgment on the plaintiff's state constitutional claims. The defendants argue that the analysis of free exercise claims under the state constitution parallels that applied to federal free exercise claims, citing Vernon v. City of Los Angeles, 27 F.3d 1385, 1392 (9th Cir.), cert. denied, 513 U.S. 1000, 115 S. Ct. 510,130 L.Ed.2d 417 (1994). The California Supreme Court recently cast doubt upon this proposition. See Smith v. Fair Employment and Housing Comm'n, 12 Cal. 4th 1143, 1177-1179, 51 Cal.Rptr.2d 700, 720-722, 913 P.2d. 909 (1996), cert denied, ____ U. S. ___, 65 U.S.L.W. 3034 (June 27, 1997) (declining to determine "scope and proper interpretation of California Constitution article I, section 4"). If the defendants' construction of California law is correct, the analysis set forth herein would apply equally to the plaintiff's state constitutional claim, and the same result would obtain. If, on the other hand, California law provides the plaintiff with more free exercise protection than the current federal regime under Employment Division v. Smith, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), it is at least theoretically possible that the plaintiff

could prevail under state law on his claim for damages even if his request to the defendants was for substitution of his committed name with his religious name (a claim untenable under Malik I). However, because the defendants have neither raised nor briefed the issue of the construction of the California Constitution in light of Smith v. Fair Employment and Housing Comm'n, supra, the court declines at this time to determine the propriety of exercising supplemental jurisdiction over the plaintiff's state law claim.[10]

RECOMMENDATION

For the reasons discussed above, the magistrate judge recommends that the court issue an order:

(1) approving and adopting this Partial Report and Recommendation;

(2) granting summary adjudication in favor of the plaintiff on the ground the following issues are without substantial controversy:

(a) the plaintiff has exhausted administrative remedies;

---

10 The defendants also have not raised the issue whether a direct private right of action for damages exists for violation of Article I, section 4 of the California Constitution. See Hill v. National Collegiate Athletic Ass'n, 7 Cal.4th 1,18, 26 Cal. Rptr. 2d 834, 844, 865, P.2d 633 (1994) (right of action exists to vindicate right of privacy guaranteed by Cal. Const. Art. I, § 1); Laguna Publishing Co. v. Golden Rain Foundation, 131 Cal.App.3d 816, 853, 182 Cal Rtpr. 813, 835 (1982), app. dism'd, 459 U.S. 1192, 103 S.Ct. 1170, 75 L.Ed.2d 422 (1983) (allowing damage action for violation of Cal. Const., Art. I, § 2, protecting freedom of speech); but see Bonner v. City of Santa Ana, 45 Cal.App. 4th 1465, 1472-1476, 53 Cal.Rptr. 3d 671, 675-678 (1996) (damages unavailable for violation of due process and equal protection clauses of Cal. Const. Art. 1, § 7); Gates v. Superior Gates v. Superior Court (Hirata), 32 Cal.App. 4th 481, 525, 38 Cal.Rptr.2d 489, 517 (1995)(equal protection clauses of California Constitution provides no private action for damages); Leger v. Stockton Unified School District, 202 Cal.App.3d 1448, 1456-1457, 249 Cal.Rptr. 688, 692 (1988) ("Safe schools" provision of California Constitution provides no private action for damages).

(b) the plaintiff's use of his religious name is an expression of his religious faith;

(c) the defendants have violated and are violating the plaintiff's right to the free exercise of his religion to the extent they have:

(i) denied the plaintiff the right to be identified by his legal, religious name, along with the plaintiff's committed name, in prison computer records and in the plaintiff's central prison file;

(ii) denied the plaintiff the right to use identification and privilege cards which identify the plaintiff by both his committed name and his legal, religious name; and

(iii) denied the plaintiff the right to receive mail services, visitation, medical care, canteen services, otherwise appropriate deliveries of money or other items from non-prisoners, and all other services and benefits to which the plaintiff would be otherwise entitled, in the plaintiff's legal, religious name and his committed name;

(3) otherwise denying the plaintiff's motion for summary judgment;

(4) granting summary adjudication in favor of the defendants on the ground the following issues are without substantial controversy:

(a) the plaintiff may not sue the defendants for damages in their official capacities;

(b) defendant Gomez is not liable for damages in his individual capacity;

(5) otherwise denying the defendants' motion for summary judgment.

Dated: July 24, 1997

/S/
JAMES W. McMAHON
United States Magistrate Judge

APPENDIX F

FILED
CLERK, U.S. DISTRICT COURT
DECEMBER 10, 1996
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-WESTERN DIVISION

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Plaintiff, v. JAMES GOMEZ, Director of Corrections; G. BONNIE GARIBAY, Chief Appeals; V. BLUESTEIN, Appeals Examiner; JOHN M. RATELLE, Warden; MIKE YARBOROUGH, Associate Warden; D. FELIX, Correctional Counselor II; D. LORENZEN, Correctional Counselor I; D. WHYTE, Correctional Counselor I, Defendants.	NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES SUPPORT THEREOF; DECLARATIONS AND EXHIBITS DATE: JANUARY 21, 1997 TIME : 9:30 AM PLACE: COURTROOM OF MAGISTRATE JUDGE McMAHON

Excerpts from pp. 3-4 of memorandum of points and authorities.

At the time plaintiff obtained his name change, the California Department of Corrections Departmental Operations Manual (DOM) provided that his new legal name would be recognized as an "also known as" on Departmental Records. DOM section 73010.6.1.

> Section 73010.6.1, Identifying Data, provided as follows: "**Name** [t]he commitment name shall be recorded as reflected on the original Abstract of Judgment/Minute Order by which the inmate was delivered to the custody of the Department . . . . Names on subsequent commitment documents which differ form the original commitment name shall be recorded as also Committed As (ACA), e.g., Jones, George; ACA: Jones, John . . . . Legal name change. Records of inmates who subsequently receive a court-ordered legal name change shall continue to use the commitment name as provided above. The new legal name shall be recorded as Also Know As (AKA)." (September 22, 1989 revision.) Exhibit 6.

The last provision was subsequently amended to read:

> Records of inmates who subsequently receive a court-ordered legal name change shall continue to use the commitment name as provided above. The new legal name shall be recorded as an ACA, e.g., Jones, George; ACA: Black, Clint."

See, e.g., DOM section 73010.6.1 Revision VII - 9, December 12, 1992. Malich Declaration, Exhixit C.

Subsequently the phrase - - "and may be used by the inmate for mail and visiting purposes" was added so that the last sentence read "[t]he new legal name shall be recorded as an ACA, e.g., Jones, George; ACA: Black, Clint, and may be used by the inmate for mail and visiting purposes." See, e.g., DOM Revision VII - 15, March 16, 1995, Malich Declaration, Exhibit D.[4]

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4 Defendants are still searching for copies of revisions VII - 10 - - VII - 14 to determine the precise date the amendment was made.

Supreme Court, U.S.
FILED
JUL 24 2000
CLERK

No. 99-1896

In The

Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court of Appeals for the Ninth Circuit

---

MOTION TO FILE IN FORMA PAUPERIS AND DECLARATION THEREOF

Catherine J. Swysen
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Counsel for Respondent

51 pp

In The

Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

The Petitioner, Shomari Naaem Shuaibe, respectfully requests leave to proceed in forma pauperis. Petitioner is an inmate incarcerated at California State Prison-Los Angeles County (CSP-LAC) and serving a sentence of life without possibility of parole. On May 22, 1995, Petitioner was granted leave to proceed in forma pauperis by the United States District Court for the Central District of California.

Dated: July 23, 2000

Respectfully submitted,

Catherine J. Swysen

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Counsel for Respondent

DECLARATION OF COUNSEL

I, Catherine J. Swysen, declare:

1. I am the attorney of record for Respondent herein.

2. I am informed and believe that Respondent qualifies to proceed in forma pauperis.

3. I am aware of the Rule 39.1 requirement that the party's notarized affidavit or declaration in the form prescribed by the Federal Rules of Appellate Procedure, Form 4 including a statement certified by the appropriate institutional officer showing all receipts, expenditures and balances during the last six months in the inmate's institutional account be filed in connection with a motion to proceed in forma pauperis.

4. I have sent the required declaration to Respondent on June 22, 2000 but have not received it back yet. I am informed and believe that Respondent has not been able to obtain yet the statement showing the activity in his trust account for the past sixth months. The declaration will be filed as soon as it is received. In the meantime, Respondent respectfully requests that the Court allow him to proceed in forma pauperis for the purpose of filing this opposition.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 23, 2000.

Catherine J. Swysen

Catherine J. Swysen

No. 99-1896

In The

Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

On Petition for a Writ of Certiorari to the United States Supreme Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION

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No. 99-1896

In The

Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners

v.

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

INTRODUCTION

Respondent, a state prisoner, was convicted of murder and sentenced to state prison under the name of Felton Lee Guillory (the "committed name".) In March 1992, Respondent legally changed his name to Shomari Naeem Shuaibe (the "religious name.)

Respondent has been a prisoner at the California State Prison at Lancaster since September 27, 1993. Since then he has been prevented from conducting his daily affairs in both his religious name and committed name. Respondent filed an Inmate Appeal on March 10, 1994 requesting that he be issued a privilege card and an identification card reflecting his religious name. He also requested that his religious name be reflected in the central file and in the prison computer. His administrative appeals were denied at all levels. The last administrative appeal was denied on

November 18, 1994. On March 21, 1995, Respondent filed a complaint in the United States District Court for the Central District of California alleging a violation of his civil rights under the First Amendment and the California Constitution.

Both Petitioners and Respondent filed motions for summary judgment in the district court which were granted in part and denied in part.

Petitioners took an interlocutory appeal to the Ninth Circuit Court of Appeals from the denial of qualified immunity on the narrow ground that they were entitled to qualified immunity because they relied on a written prison policy. The Ninth Circuit affirmed the district court decision and denied the Petitioners' petition for rehearing *en banc*.

The case is currently pending in the district court. A pre-trial conference is scheduled on October 2, 2000.

STATEMENT OF JURISDICTION

First, this Court lacks jurisdiction to hear this interlocutory appeal from the denial of qualified immunity because the district court denied immunity on the basis that material facts are in dispute. *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Johnson v. Jones*, 515 U.S. 304 (1995).

Secondly, Petitioners raise in their Petition questions which were not raised below and, therefore, have been waived.

In their interlocutory appeal to the Ninth Circuit,

Petitioners raised only a narrow issue related to their claim of qualified immunity asking the Ninth Circuit to "hold that state employees relying on published regulations, policies and procedures which they are unable to ignore, change, modify or rescind are entitled to qualified immunity in section 1983 action charging them with violation of federal rights because of their reliance of these regulations, policies and procedures" (Resp. Appendix, 33):

> "This case presents a question of first impression in this circuit regarding the defense of qualified immunity for state employees who are required to follow and do follow published regulations, policies and procedures. In the case at bench, the state employee defendants followed published regulations in reviewing and deciding whether to grant or deny an inmate grievance. *The issue presented is whether the state employee defendants are entitled to summary judgment on the grounds of qualified immunity in an inmate civil rights action pursuant to 42 U.S.C. § 1983 when the inmate grievance was denied on the basis of published regulations, policies and procedures which they are unable to ignore, amend, change, modify, or rescind and/or upon which they reasonably relied."* Resp. Appendix, 19-20. [emphasis added.]

Petitioners failed to raise before the Ninth Circuit Court of Appeal the issue of whether *Turner V. Safley*, 482 U.S. 78 (1987) requires prison officials to change or replace record-keeping practices (question 2) and the issue of whether the Ninth Circuit's alleged misapplication of *Turner* affects the precedential value of its opinions on inmates' legal religious name changes and calls into question their continued validity (question 3).

Accordingly, these issues have been waived by petitioners.

Thirdly, Rule 10 of the Rules of the Supreme Court of the United States provides that this Court may grant a petition for writ of certiorari only for compelling reasons. Petitioners attempt to satisfy Rule 10 by contending that there is an inter-circuit conflict on the issue of qualified immunity. There is no such conflict. The district court in this case, as well as the courts in the cases cited by Petitioners in support of their contention, followed this Court's precedents in analyzing Petitioners' claim of qualified immunity.

Fourthly, Rule 10 also provides that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or a misapplication of a properly stated rule of law." The district court in this case properly analyzed Petitioners' claim of qualified immunity pursuant to the standard set forth by this Court and found that there was a material issue of fact preventing the entry of summary judgment on that issue. The Ninth Circuit Court of Appeals affirmed.

There is no compelling reasons for this Court to grant the petition for writ of certiorari.

STATEMENT OF THE CASE

In their motion for summary judgment, Petitioners argued that they should be entitled to qualified immunity under the rule set forth in *Harlow v. Fitzgerald*, 457 U.S. 396 (1982). They argued

that Respondent wanted to use his religious name exclusively on all prison documents and records as well as correspondence and that there was no clearly established right to do so under *Malik I, Malik II,* and Malik III.[1]

They argued also that assuming that Respondent was requesting that he be allowed to use both names, they would still be entitled to qualified immunity because the right to do so was not clearly established enough to alert a reasonable official to its parameters and a reasonable officer, following the prison regulation, would have believed that the particular conduct at issue to be lawful. Resp. Appendix 37-43.

The district court following the rule set forth in *Harlow v. Fitzgerald* found that the law was "'clearly established, in 1994 when the alleged events in this action occurred, that prison officials could not constitutionally deny an inmate the right to use his religious, legal name, in addition to his committed name, in order to obtain prison services or benefits." Pet. Appendix, 38a. It also found that it would have been unreasonable for Petitioners to deny him the right to obtain services and privileges in both names. Pet. Appendix, 37a. Finally, the district court held that the existence of a genuine issue of fact as to the nature

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[1]*Malik v. Brown,* 16 F.3d 330 (9th Cir. 1994) (*Malik I*), mandate recalled and opinion supplemented, 65 F.3d 148 (9th Cir. 1995) (*Malik II*), and *Malik v. Brown,* 71 F.3d 724 (9th Cir. 1995) (*Malik III*)

of Respondent's claim precluded the application of the doctrine of qualified immunity. Pet. Appendix, 36a.

In their interlocutory appeal to the Ninth Circuit, Petitioners did not challenge the holding by the district court that the law was clearly established in 1994 that an inmate had a constitutional right to use both his religious name and his committed name in conducting his daily affairs. They did not challenge the holding in *Malik*. They argued only that they were entitled to qualified immunity as a matter of law solely because they relied on a written prison policy.

Petitioners had opposed Respondent's request for injunctive relief on the ground, among others, that Respondent had not demonstrated that his constitutional rights had been violated.

The district court held that Respondent was entitled to the prospective relief of using his legal, religious name in addition to his committed name. The district court did not decide the appropriate scope of a permanent injunction since this issue had not been raised or briefed. The appropriate scope of a permanent injunction was left for a subsequent motion.[2] Pet. Appendix, 38a and 43a.

Petitioners did not challenge this holding.

In its ruling, the district court found that Petitioners had not offered "evidence of any legitimate penological reason why the

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[2]This motion has not been filed yet.

plaintiff should not be allowed to use his religious name as well as his committed name", nor any evidence that "changing their records to reflect the plaintiff's legal, religious name would 'wreak havoc'. . ." since that contention was "based upon a one-page 'fact sheet' ... which is inadmissible ...". Pet. Appendix 39a-40a.

Petitioners sought to introduce new facts on that issue in their objections to the Report and Recommendation through, inter alia, the declaration of Larry Wagner which is attached to their Petition. Pet. Appendix 8a-16a. These facts are restated on pages 12-14 of their Petition.

COMPELLING REASONS DO NOT EXIST TO GRANT A WRIT OF CERTIORARI

1. The District Court Followed the Appropriate Analysis Set Forth by this Court in Harlow V. Fitzgerald[3] in Determining Petitioner's Claim of Qualified Immunity and Properly Denied Qualified Immunity on the Basis That Material Facts Are in Dispute.

This Court has set the standard to analyze and determine claims of qualified immunity in civil rights case in *Harlow v.*

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[3]457 U.S. 396 (1982)

Fitzgerald[4]:

> "We ... hold that government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know. . . . On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew or should have known the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors." *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819 (1982).

This is the standard that the district court followed in analyzing Petitioners' claim of qualified immunity. The district court held that an inmate constitutional right to use both his religious name and committed name in his daily affairs was clearly established in 1994 in light of *Malik v. Brown*, 16 F.3d 330 (9th Cir. 1994) (*Malik I)* which held that an inmate has a right to use

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[4]457 U.S. 800 (1982)

both his committed name and religious name "in his daily affairs" and *Malik v. Brown,* 71 F.3d 724 (9th Cir. 1995) (*Malik III)* which held that an inmate First Amendment right to use his religious name in conjunction with his committed name was clearly established in 1990. The district court also held that it would have been unreasonable for the Petitioners to deny Respondent the right to obtain services in both names. Finally, the District court denied qualified immunity because there was a genuine issue of fact as to the nature of Respondent's claim precluded the application of the doctrine of qualified immunity.

2. Contrary to Petitioners' Contention, There Is No Conflict among the Circuits on the Issue of Qualified Immunity, Therefore, the Petition must Be Denied.

A. No Circuit Has Ever Held That Public Employees Required as a Condition of Employment to Follow Written Policy Which They Did Not Make, May Not Modify and Cannot Ignore Are Entitled to Qualified Immunity as a Matter of Law Even If a Court Later Finds Their Employer's Policy to Be in Error.

No authorities cited by Petitioners stand for the proposition that public employees required as a condition of employment to follow written policy which they did not make, may not modify and cannot ignore are entitled to qualified immunity as a matter of law even if a court later finds their employer's policy to be in error.

Wolfel v. Morris does not stand for the proposition that prison officials relying on published regulations are entitled to qualified immunity as a matter of law but rather stand for the proposition that a prison official relying on a facially valid regulation will be entitled to qualified immunity unless he knows or should have known that the regulation violates a clearly established constitutional right. The plaintiffs inmates in *Wolfel* "were punished by prison officials for circulating a petition aimed at redressing their grievances against the conditions at the Southern Ohio Correctional Facility." The court ruled that the prison regulation used to punish the inmates was unconstitutionally vague. Following the standard set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 483 U.S. 635 (1987), the court held that the defendant were entitled to qualified immunity because a reasonable officer, relying on the regulation, could have believed that the conduct was lawful since they relied on a regulation which had not been found unconstitutional yet and the court could not ". . . say that no reasonable official, even knowing the general requirements of notice and specificity, could have thought that the regulation provided sufficient notice that the prisoners' actions were punishable." *Wolfel v. Morris,* 972 F.2d at 719-720.

Gorra v. Hanson, 880 F.2d 95 (8th Cir. 1989) also follows the standard set forth in *Harlow* to determine the claim of qualified

immunity. The plaintiff in *Gorra* sued troopers alleging that they had arrested him without probable cause for a violation of a statute prohibiting intentionally preventing the apprehension of another. Analyzing the reasonableness of the troopers' conduct in light of the law that was clearly established at the time of the arrest, the court granted qualified immunity because at the time of the arrest the courts had not yet construed the law and because the troopers' interpretation of the statute was not unreasonable. *Gorra v. Hanson*, 880 F.2d at 98.

Following a similar analysis, the court in *Moorman v. Thalacker*, 83 F.3d 970 (6th Cir. 1996), held that the defendants were entitled to qualified immunity stating that "[w]here there is no clearly established interpretation to the contrary, we defer to prison officials' interpretation of their rules to the facts so long as that interpretation and application is not objectively unreasonable." *Moorman v. Thalacker*, 83 F.3d at 974.

In the present case, the district court followed also the *Harlow* standard. The court found that it would have been unreasonable for Petitioners to believe that their conduct - preventing Petitioner from conducting his daily affairs in both his committed name and religious name - was lawful in light of the fact that the law was clearly established in the Ninth Circuit that he had the right to do so.

B. There Is No Conflict Between the Circuits.

Petitioners have not shown any conflict between the circuits on the issue of qualified immunity. The Ninth Circuit as well as the Sixth and Eighth Circuits all analyze claims of qualified immunity pursuant to the standard set forth by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The decision of *LSO, Ltd. v. Stroh*, 205 F.3d 1146 (9th Cir. 2000) is not in conflict with cases cited by Petitioners. In *Stroh*, the court analyzed the claim of qualified immunity pursuant to *Harlow*. The court held that the law was clearly established in light of a decision from this Court that liquor regulations could not be used to impose restrictions on speech that would otherwise be prohibited under the First Amendment. The court also held that no reasonable official could have believed the conduct was lawful based on that precedent. *LSO, Ltd. v. Stroh*, 205 F.3d at 1157-1160.

3. The Question of Whether Prisons must Change or Reorganize Their Record Keeping Practices to Accommodate Inmates' Legal Name Changes (Question 2) Is Not Properly Before this Court.

First, this issue was not raised by Petitioners in their interlocutory appeal. Accordingly this question is waived.

Secondly, it is premature for this Court to consider this question based on the record.

The district court held that Respondent is entitled to the

prospective injunctive relief of using his legal, religious name in addition to his committed name. However, the district declined to determine the appropriate scope of injunctive relief since it has neither been briefed or raised. Pet. Appendix, 43a. The scope of injunctive relief still need to be determined by the trial court after both parties have had an opportunity to submit evidence.

Petitioners did not appeal this ruling.

Respondent had requested that the court issue an order directing Petitioners to allow him to use identification and privilege cards bearing both his committed and religious names, to identify him in prison computer records and central file by his committed name and also his religious name whether by "ACA" designation or otherwise and to receive prison services and benefits in his religious and committed names. The district court noted that Petitioner did not claim that the CDC files should be altered so as to reflect his religious name as his principal name rather than an "ACA" and did not request that his committed name be eliminated. Pet. Appendix, 39a-40a. In fact, in this case, the prison regulations themselves requires that a prisoner's legal name change be reflected as an "ACA." Pet. Appendix, 40a.

Since no order has been issued yet requiring Petitioners to change or re-organize their record keeping practices and the record does not support that contention, it is premature for this Court to consider this question.

4. The Question of Whether the Ninth Circuit's Alleged Misapplication of *Turner* Affects the Precedential Value of its Opinions on Inmates' Legal Religious Name Changes and Calls into Question Their Continued Validity (Question 3) Is Not Properly Before this Court.

Petitioners are asking this Court to review the Ninth Circuit decision in *Malik v. Brown,* 16 F.3d 330 (9th Cir. 1994) (*Malik I*), mandate recalled and opinion supplemented, 65 F.3d 148 (9th Cir. 1995) (*Malik II*). This is beyond the scope of this interlocutory appeal. Furthermore, Petitioners waived that issue by failing to raise it below in the Ninth Circuit Court of Appeals.

CONCLUSION

Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 99-1896

In The
Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners
v.
SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHOMARI NAEEM SHUAIBE, aka Felton Lee Guillory, Plaintiff/Appellee, v. JAMES GOMEZ, et al., Defendants/Appellants.	NO. 99-55049 No. CV 96-3395 RAP (Mc) CENTRAL DISTRICT OF CALIFORNIA

DEFENDANTS-APPELLANTS' BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHOMARI NAEEM SHUAIBE, aka Felton Lee Guillory,	)	No. 99-55049
Plaintiff/Appellee,	)	No. CV 96-3395 RAP (Mc)
v.	)	CENTRAL DISTRICT OF CALIFORNIA
JAMES GOMEZ, et al.,	)	
Defendants/Appellants	)	

DEFENDANTS-APPELLANTS' BRIEF

* * *

ISSUES PRESENTED

(1) This case presents a question of first impression in this Circuit regarding the affirmative defense of qualified immunity for state employees who are required to follow and do follow published regulations, policies and procedures. In the case at bench, the state employee defendants followed published regulations in reviewing and deciding whether to grant or deny an inmate grievance. The issue presented is whether the state

employee defendants are entitled to summary judgment on the grounds of qualified immunity in an inmate civil rights action pursuant to 42 U.S.C. 1983 when the inmate grievance was denied on the basis of published regulations, policies and procedures which they were unable to ignore, amend, change, modify, or rescind and/or upon which they reasonably relied.

STATEMENT OF THE CASE

A. JURISDICTION

This interlocutory appeal is from the October 16, 1998 order by United States District Court Judge Richard A. Paez of the United States District Court for the Central District of California denying defendants-appellants' motion for reconsideration of the September 4, 1998 order by then United States District Court Judge Kim McLane Wardlaw partially granting and partially denying summary adjudication and denying the parties' cross-motions for summary judgment.

Jurisdiction of the district court arose under 42 U.S.C. 1983 and 28 U.S.C. 1291.

This court has jurisdiction over interlocutory appeals regarding qualified immunity pursuant to 28 U.S.C. 1291. United

States v. Wallace & Tiernan Co., 336 U.S. 793, 794-5, 69 S. Ct. 824, 825-26, fn. 1, 93 L. Ed. 1042 (1949); Baker v. Racansky, 887 F. 2d 183, 185 (9th Cir. 1989).

B. PROCEEDINGS BELOW

The initial complaint was filed on March 21, 1995. (D.C. Dk. 1.) On March 31, 1995, the United States Marshal was ordered to serve all eight defendants in their individual and official capacity. (D.C. Dk. 4.) On December 10, 1996, defendants filed a motion for summary judgment. (D.C. Dk. 50.) Plaintiff also submitted a motion for summary judgment which was filed January 16, 1997. (D.C. Dk. 51). The district court initially took plaintiff's motion off-calendar as untimely filed (D.C. Dk. 57) and denied his motion to have it placed back on the court's calendar. (D.C. Dk. 59.) However, defendants filed a statement of non-opposition to plaintiff's second ex parte motion to have his motion for summary judgment placed back on the court's calendar. (D.C. Dks. 63, 60.) The court's docket does not contain a docket entry numbered 66; presumably the missing entry is the court's order placing plaintiff's motion for summary judgment back on calendar.

On July 24, 1998, the Magistrate Judge issued a report and recommendation partially granting and partially denying summary adjudication for plaintiff and for defendants and otherwise denying their motions for summary judgment. (D.C. Dk. 67.) On August 8, 1998, defendants filed objections to the report and recommendation. (D.C. Dk. 69.) On September 4, 1998, following a de novo review, the court issued an order granting and denying partial summary adjudication and denying the parties' motions for summary judgment. (D.C. Dk. 73 and 74.)

In its order entered September 8, 1998, the court granted partial summary adjudication in favor of plaintiff on the grounds that it was without substantial controversy that, inter alia, defendants have violated and are violating plaintiff's right to free exercise of his religion to the extent that they have denied him the right to be identified by his legal religious name and his committed name in prison computer records and his central prison file, to use identification and privilege cards identifying him by both names and denying him the right to receive mail, visitation, medical care, canteen services, otherwise appropriate deliveries of money or other items from

non-prisoners, and all other services and benefits to which he would otherwise be entitled in his legal, religious name and his committed name. (D.C. Dk. 73, pp. 1-2.)

The court granted partial summary adjudication in favor of defendants on the grounds that it was without substantial controversy that, inter alia, plaintiff cannot sue defendants for damages in their official capacities and former Director Gomez is not liable for damages in his individual capacity. (D.C. Dk. 73, p. 2.)

On September 11, 1998 the case was transferred from the calendar of then United States District Judge Wardlaw to the calendar of United States District Judge Paez. (D.C. Dk. 76.)

On September 17, 1998, defendants filed a motion for reconsideration. (D.C. Dk. 74.) Defendants' motion was based on two grounds. One ground was that the court's manifest failure to consider the material fact of their good faith reliance on facially valid departmental regulations. The second ground was that, due to the lengthy delay of more than a year from the briefing to the issuance of the order, recent developments in applicable case law presented a material difference in law. Cf.,

Local Rule 7.16 (a) and (c) of the United States District Court for the Central District of California. (D.C. Dk. 75.)

On October 16, 1998, the motion for reconsideration was denied. (D.C. Dk. 82.)

Proceedings in the District Court have been stayed pending this interlocutory appeal. (D.C. Dk. 93.)

C. CUSTODY AND BAIL STATUS

Plaintiff-appellee is presently confined by the California Department of Corrections at California State Prison - Los Angeles County in Lancaster, California. He is serving a sentence of life imprisonment without the possibility of parole.

D. STANDARD OF REVIEW

Cases presenting purely or predominately legal issues are reviewed de novo. Premier Communications Network v. Fuentes, 880 F.2d 1096, 1102 (9th Cir. 1989). Grants of summary judgment are reviewed de novo. Bagdadio v. Nazar, 84 F. 3d 1194, 1197 (9th Cir. 1996). Denials of qualified immunity are reviewed de novo. Baker v. Racansky, 887 F. 2d 183, 185 (9th Cir. 1989).

STATEMENT OF FACTS

Plaintiff was convicted, sentenced, and committed to the

California Department of Corrections (CDC) under the name Felton Lee Guillory on November 21, 1984. (D.C. Dk. 1, Exh. A, p. 1.)

In April, 1992, plaintiff legally changed his name to Shomari Naeem Shuaibe. (D.C. Dk. 1, Exh. B.) Plaintiff's legal name change occurred prior to the enactment of California Penal Code section 1279.5(b), which provides that, effective January 1, 1995, inmates incarcerated in CDC must secure the prior approval of the Director of Corrections before petitioning the state superior court for a name change.

Plaintiff filed an inmate grievance regarding his name change on March 10, 1994; it was denied at the third and final (Director's) level on November 18, 1994. (D.C. Dk. 1, Exh. A.)

In his complaint, plaintiff alleged that James Gomez, then Director, California Department of Corrections, violated his rights under the Religious Freedom Restoration Act, the First Amendment of the United States Constitution and California law. (D.C. Dk. 1, p. 6(c), last sentence.)

Plaintiff alleged that the other seven defendants violated his rights under the First Amendment and California law. (D.C. Dk. 1.) Plaintiff names three correctional counselors (Whyte,

Lorenzen and Felix), an associate warden (Yarborough), an acting warden (Ratelle), an appeals examiner (Bluestein), and the Chief of the Inmate Appeals (Garibay) in addition to the director. (Id.)

Plaintiff seeks declaratory and injunctive relief. (Id., p. 8.). He also seeks "prospective damage" ranging from $2 million from Director Gomez to $500,000 each from the three correctional counselors, "compensatory damage" of $50,000 from each defendant, "special damages" of $50,000 from each defendant, and $1 million for "other harm" from both Gomez and Ratelle. (Id.)

The California Department of Corrections Departmental Operations Manual (DOM) contains a provision directing Departmental staff to use an inmate's commitment name to identify that inmate throughout his term. (D.C. Dk. 50, pp. 3, 4, 74.) The manual contains provisions indicating that an inmate's other names, including legal name changes, are to be recorded as ACA's ("also committed as") or AKA's ("also known as"). On March 16, 1995, the applicable DOM section was modified to specifically provide that an inmate's legal name change would be recorded as an ACA for visiting and mail purposes. (D.C. Dk. 50, p. 42.)

Neither the earlier version nor the revision permitted substitution of an inmate's new legal name for his commitment name. (D.C. Dk. 50, p. 41.) This rule was uniform irrespective of whether the name change was religious or other personal reasons.

The Regulation and Policy Management Branch and the Legal Affairs Division of the Department are responsible for monitoring developments in the law and for incorporating them when appropriate into revisions of the Departmental Operations Manual (DOM). Departmental staff are to follow the DOM. (D.C. Dk. 50, pp. 4, 32, 37, 45 and 46.)

The discovery cut-off date was October 31, 1996. (D.C. Dk. 42.) The motion cut-off date was December 10, 1996. (D.C. Dk. 42.) The Religious Freedom Restoration Act was held unconstitutional on June 25, 1997. City of Boerne v. Flores, ___ 521 U.S. ___, 117 S. Ct. 2157, 2172, 138 L. Ed. 2nd 624 (1997).

On September 4, 1998, the District Court issued an order partially granting and partially denying summary adjudication. (D.C. Dk. 67.)

Defendants filed objections, pointing out, inter alia, that

information regarding plaintiff's religious name is, and was at all times relevant herein, contained in his inmate central file and visiting file. His religious name is listed in the Also Committed As alias tracking information in the California Department of Corrections' Offender Based Information System (OBIS). (D.C. Dk. 69, Declaration of Cruz.) There are other Department of Corrections' information management systems, most of which do not have the capacity to accept aliases. Defendants wish to advise this court that the Correctional Management Information System referenced in paragraph 3 of Wagner's declaration was not implemented and the contract was not renewed.

ARGUMENT

I

QUALIFIED IMMUNITY

Defendants are entitled to qualified immunity because they acted in good faith and relied upon existing published departmental regulations which were objectively reasonable on their face in their review of plaintiff's inmate grievance.

While they had the discretion necessary to review, hear, grant or deny plaintiff's inmate appeal, defendants Whyte,

Lorenzen, Felix, Yarborough, Ratelle, Bluestein, and Garibay did not have discretion to change the Departmental policy which was being grieved. All defendants, including former Director Gomez, reasonably assumed, and were entitled to assume, that the Departmental Operations Manual and other published regulations, policies and procedures were being revised, amended or updated as necessary to comply with applicable changes in the law.

While this Circuit appears not to have explicitly addressed the issue, the Sixth Circuit has held that officials relying on published regulations were entitled to qualified immunity. Wolfel v. Morris, 972 F. 2d 712, 719-20 (6th Cir. 1992). The Sixth Circuit held that even though courts reviewing the official's action subsequently found that their interpretation of the regulation was in error, these officials were entitled to qualified immunity. Id. This rule has found acceptance in district courts who have recognized that qualified immunity extends to prison officials who rely on a facially valid regulation. See, e.g., Depugh v. Penning, 888 F. Supp. 959, 998 (N.D. Iowa 1995); Jaeger v. Dubuque County, 880 F. Supp. 640 (N.D. Iowa 1995); and Kurtz and Ross v. Denniston and Doe, 872 F.

Supp. 631 (N.D. Iowa 1994).

The view that reliance on published regulations entitles state employees and officials to qualified immunity finds support in the United States Supreme Court's opinions in Harlow v. Fitzgerald, 457 U. S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982) and Mallory v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). The "objective reasonableness" standard set forth in Harlow was specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Harlow, 457 U.S. at 815 - 16, 102 S. Ct. at 2736 - 37. In Mallory, the Supreme Court recognized if officers of reasonable competence could disagree on an issue, immunity should be recognized. Thus, the doctrine of qualified immunity also protects officials from liability for their reasonable efforts even if their conclusions and actions are arguably wrong. See, e.g., Moorman v. Thalacker, 83 F. 3d 970, 974 (8th Cir. 1990); Bartlett v. Fisher, 972 F. 2d 911, 914 (8th Cir. 1992); Gona v. Hanson, 880 F. 2d 95, 97-98 (8th Cir. 1989).

Here, plaintiff is a California prisoner who represented

himself in pro per during the initial years of this litigation. In the case at bench, seven defendants[1/] have been required to enter appearances, respond to discovery and file pleadings. If they are not granted qualified immunity, these state employees will be forced to stand trial in an action alleging that a policy they did not institute and could not change is, in plaintiff's eyes, unconstitutional. Plaintiff's naming of every person who was involved in the review of his inmate appeal has caused unnecessary disruption to governmental operations and created an unnecessary expense to state and federal taxpayers as well as an undue burden on the court. The Harlow reasonableness standard was designed and adopted so that insubstantial claims could be resolved on summary judgment and that these disruptions, expenses and burdens could be avoided. See, generally, Butz v. Economou, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978), cited with approval in Harlow, 475 U.S. at 815-16, 102 S. Ct. at 2736-37. Defendants submit they are entitled to qualified immunity and that the court erred in denying their motion for summary judgment.

---

1. A suggestion of death on the record has been filed for Victor Bluestein.

CONCLUSION

For the foregoing reasons, this Circuit should expressly hold that state employees relying on published regulations, policies and procedures which they are unable to ignore, change, modify or rescind are entitled to qualified immunity in section 1983 actions charging them with violations of federal rights because of their reliance on these regulation, policies and procedures. The district court's order denying defendants-appellants' motion for reconsideration should be reversed and the matter remanded to the district court for further proceedings in accordance with this court's order granting defendants qualified immunity.

DATED:

BILL LOCKYER, Attorney General
of the State of California
DAVID DRULINER, Acting Chief
Assistant Attorney General
MORRIS LENK, Acting Senior Assistant
Attorney General
DARRELL LEPKOWSKY, Supervising
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By René Lucann for
JANE CATHERINE MALICH
Deputy Attorney General

Attorneys for Defendants/Appellants

STATEMENT OF RELATED CASES

This is to certify that the undersigned deputy does not know of any related cases pending before this court within the meaning of Rule 28-26, Rules of the Ninth Circuit Court of Appeals.

DATED:

BILL LOCKYER, Attorney General
of the State of California
DAVID DRULINER, Acting Chief
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By René Lucasin for
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Deputy Attorney General

Attorneys for Defendants/Appellants

STATEMENT OF COMPLIANCE WITH CIRCUIT RULE 32-1

Pursuant to Ninth Circuit Rule 32-1, I certify that the opening brief is monospaced, has 10.5 or less characters per inch and contains 2,536 words or 342 lines or 342 lines of text.

DATED:

BILL LOCKYER, Attorney General
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DECLARATION OF SERVICE

Case Name: **SHUAIBE, aka GUILLORY v. GOMEZ, et al.**
Case No.: **CV 95-1764 RAP (Mc)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 3, 1999, I placed the attached

DEFENDANTS-APPELLANTS' BRIEF

in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

Catherine Swysen
Sanger & Swysen
233 East Carrillo Street, Suite C
Santa Barbara, CA 93101

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on March 3, 1999 at Los Angeles, California.

Declarant **GIL CARREON**

No. 99-1896

In The
Supreme Court of the United States

C.A. TERHUNE, et al., Petitioners
v.
SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Respondent.

APPENDIX B

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

SHOMARI NAEEM SHUAIBE, aka FELTON LEE GUILLORY, Plaintiff, v. JAMES GOMEZ, Director of Corrections; et al., Defendants.	Case No.: CV 95-1764 AWT (Mc) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATIONS AND EXHIBITS DATE: JANUARY 21, 1997 TIME: 9:30 AM PLACE: COURTROOM OF MAGISTRATE JUDGE McMAHON

(Defendants' receipt of the signed original declarations of Yarborough and Garibay has been delayed due to illness and a delay in overnight mail. Defendants will file the signed originals upon receipt. They are submitting the facsimile signature of Yarborough and, as an exhibit to the Malich Declaration, the approved declaration of Garibay.)

assets. See, Complaint, Exhibit D.

VII

DEFENDANTS CANNOT BE LIABLE UNDER RESPONDEAT SUPERIOR

Supervisory personnel are not generally liable under the Civil Rights Act for the actions of their subordinates under a theory of respondeat superior and, therefore, when a named defendant holds a supervisorial position, the causal link between them and the claimed constitutional violation must be specifically alleged. See, Fayle v. Strapley, 607 F.2d 858 at 862 (9th Cir. 1979); Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982).

Director Gomez and the other defendants cannot be held liable for the acts of their subordinates under a theory of respondeat superior. Milton v. Nelson, 527 F.2d 1158, 1159 (9th Cir. 1975). The failure to establish a nexus with any alleged impropriety set forth in Plaintiff's complaint compels a summary judgment for defendants.

VIII

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Defendants submit that assuming arguendo any violation of plaintiff's rights occurred whatsoever, they are entitled to qualified immunity.

Under the rule set forth in Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), a governmental official performing discretionary functions is shielded from liability for civil damages insofar as his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Ibid. The purpose of the rule is to permit such officials

to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. Id., at 819; Kraus v. County of Pierce, 793 F.2d 1105, 1108 (9th Cir. 1986).

The Harlow test is an objective one. Harlow v. Fitzgerald, 457 U.S. at 818; Lowe v. City of Monrovia, 775 F.2d 998, 1011 (9th Cir. 1985). The reasonableness of an official's conduct is measured by reference to clearly established law at the time of the acts at issue. Harlow v. Fitzgerald, 457 U.S. at 818; Lowe v. City of Monrovia, 775 F.2d at 1011. In determining whether the applicable law was clearly established, the court looks to decisions of the United States Supreme Court first and then to decisions within the circuit where the case arose. See Capoeman v. Reed, 754 F.2d 1512, 1514 (9th Cir. 1985). In the absence of binding precedent, the court looks to whatever decisional law is available. Ibid. If the official's action was reasonable, even if mistaken, then Harlow immunity applies, and an action for damages must be dismissed. Guerra v. Sutton, 783 F.2d 1371, 1374 (9th Cir. 1986).

Further, the contours of the "clearly established" right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). A reasonable person standard adheres at all times. Ward v. County of San Diego, 791 F.2d 1329, 1332 (9th Cir. 1986).

The qualified immunity test requires the court engage in the following steps. First, the specific right or rights allegedly

violated must be identified. Second, a determination of whether that right was so clearly established as to alert a reasonable officer to its constitutional parameters. Third, the ultimate determination of whether a reasonable officer could have believed lawful the particular conduct at issue. Romero v. Kitsap County, 931 F. 2d 624, 627 (9th Cir. 1991).

In this case, plaintiff wants to use his new religious name exclusively on all prison documents and records, as well as correspondence. There is no clearly established right to do so under Malik I, II, and III. Defendants submit that the Malik triology can be read to permitted the use of a religious name on outgoing correspondence in addition to the inmate's committed name but that a more extensive reading of these cases is not supported. Because plaintiff wanted relief which was not mandated by the Constitution, defendants are entitled to qualified immunity.

Assuming arguendo that plaintiff's complaint can be construed as asserting a right to use both names, defendants assert that they are still entitled to qualified immunity under the second and third prongs of the Romero test.

Respecting the second prong, defendants assert that the right was not clearly established enough to alert a reasonable officer or administrator to its parameters. While the Ninth Circuit denied Washington state officials qualified immunity in Malik II on the grounds that the law was clearly established that an inmate had the right to use his committed and new legal religious name on outgoing mail, defendants submit that the law was not clearly established and there was, in fact, a division between the circuits, particularly in light of Malik I's overbreadth and

dicta that inmate entitled to use his name on "correspondence and other documents." See, e.g., Akbar v. Canney, 634 F.2d 339 (6th Cir. 1980), cert. denied, 450 U.S. 1002 (1981)(holding that prison officials do not have to change all their records to reflect the newly adopted name of a prisoner who has converted to Islam; prisoners do not have a constitutional right to dictate how prison officials keep their prison records); Azeez v. Fairman, 795 F.2d 1296 (7th Cir. 1986) (law not clearly established); Muhammad v. Wainwright, 839 F. 2d 1422 (11th Cir. 1987)(prisoner who legally changed his name for religious reason could be disciplined for refusing to respond to his committed name during roll call); Salahuddin v. Coughlin, 591 F. Supp. 353 (S.D.N.Y. 1984) (prison officials not required to recognize informal adoption of religious names), rev'd on other grounds, 782 F.2d 1127 (2d Cir. 1986); Rahman v. Stephenson, 626 F. Supp. 886 (W.D. Tenn. 1986) (same).

The third factor considered under Romero is whether a reasonable officer could have believed lawful the particular conduct at issue. Defendants maintain that a reasonable person would have believed that following DOM did not violate plaintiff's clearly established rights. Plaintiff did not cite United States Supreme Court or Ninth Circuit authority supporting his claim that he was entitled to have his religious name substituted for his commitment name everywhere it could possibly be used in prison. Defendants submit that a reasonable officer or administrator would have believed that following DOM was lawful. Qualified immunity extends to a prison official who relies on a facially valid regulation. Kurtz and Ross v. Denniston and Doe, 872 F. Supp. 631 (N.D. Iowa 1994), citing Wolfel v. Morris, 972 F. 2d 712, 719 - 20

(6th Cir. 1992) (holding at 719 that officials relying on published regulation were entitled to qualified immunity even though courts reviewing their action subsequently found that their interpretation of the regulation was in error). Qualified immunity also protects officials from liability for their reasonable efforts even if their conclusions and actions are arguably wrong. Mallory v. Briggs, 475 U.S. 335, 106 S. Ct. 1092, 89 L. Ed. 2d 27 (1986); Moorman v. Thalacker, 83 F. 3d 970, 974 (8th Cir. 1990); Bartlett v. Fisher, 972 F. 2d 911, 914 (8th Cir. 1992); Gona v. Hanson, 880 F. 2d 95, 97-98 (8th Cir. 1989).

Moreover, government officials are not required to predict the future course of constitutional law. Lum v. Jensen, 76 F.2d 1385, 1388 (9th Cir. 1989) (citing cases).

For these reasons, defendants submit that they are entitled to qualified immunity.

VI

SINCE NONE OF PLAINTIFF'S FEDERAL CLAIMS SURVIVE THE INSTANT MOTION, THIS COURT SHOULD DECLINE TO EXERCISE ITS SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S STATE CLAIMS

Plaintiff alleges that defendants have violated his rights under Article 1, section 1 and Article 1, section 4 of the Constitution of the State of California.

Defendants are once again hampered by the conclusory nature of plaintiff's pleading from being certain which of the various inalienable rights guaranteed under Article 1, Section 1 of the California Constitution plaintiff believes was violated.[8]

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8. Article 1, section 4 of the California Constitution guarantees free exercise of religion, among other provisions.